



No. 83-305

In The

Supreme Court of the United States
October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
vs.

ALBERT WALTER TROMBETTA, et al.,
Respondents.

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES IN CALIFORNIA
COURTS UP TO CONSOLIDATION IN
CALIFORNIA COURT OF APPEAL

The People of the State of California
v. Albert Walter Trombetta

Sonoma County Municipal Court No. 78532 TCR
Sonoma County Superior Court No. 209-C
Court of Appeal (1st App. Dist., Div. 4) No. A016358

Sonoma County Municipal Court No. 78532 TCR
2 Feb 1981 Complaint Filed
11 Feb 1981 Plea Entered, "Not Guilty"
4 Mar 1981 Request & Demand for Disclosure &
Inspection of Evidence Filed
23 Mar 1981 Motion for Suppression as Evidence,
Motion in Limine, and for Protective
Order Filed
30 Mar 1981 Evidentiary Hearing [before Antolini]
7 May 1981 Ruling Denying 1538.5 and Other Motions
2 Jun 1981 Notice of Appeal Filed

Sonoma County Superior Court No. 209-C
20 Jan 1982 Decision Denying Motion to Suppress
26 Jan 1982 Petition for Rehearing and Application
for Certification Filed
17 Feb 1982 Order Denying Rehearing and
Certifying for Transfer to Court of Appeal

Court of Appeal (1st App. Dist., Div. 4) No. A016358
24 Mar 1982 Appeal Transferred

The People of the State of California
v. Michael Gene Cox

Sonoma County Municipal Court No. 77262 TCR
Sonoma County Superior Court No. 215-3
Court of Appeal (1st App. Dist., Div. 4) No. A016374

Sonoma County Municipal Court No. 77262 TCR
22 Dec 1980 Complaint Filed
11 Feb 1981 Plea Entered, "Not Guilty"
13 Apr 1981 Motion to Suppress Evidence, for
Protective Order, Points & Authorities &
Declarations in Support Thereof Filed
19 May 1981 Declaration of Michael Gene Cox in
Support of Motion to Suppress Filed
25 Jun 1981 Supplemental Points & Authorities in
Support of Defendant's Motion to
Suppress Filed
10 Jul 1981 Motion Denied
30 Jul 1981 Notice of Appeal and Stipulation
[Trombetta Hearing Applies] Filed

Sonoma County Superior Court No. 215-3
20 Jan 1982 Decision Denying Motion to Suppress
9 Feb 1982 Petition for Rehearing and Application
for Certification Filed
25 Feb 1982 Order Denying Rehearing and
Certifying for Transfer to
Court of Appeal

Court of Appeal (1st App. Dist., Div. 4) No. A013674
24 Mar 1982 Appeal Transferred

The People of the State of California
v. Gregory Moller Ward

Contra Costa County Municipal Court
(Walnut Creek-Danville) No. 31381-7

Contra Costa County Municipal Court
(Walnut Creek-Danville) No. 32153-9

Contra Costa County Superior Court
Nos. 25717 & 25718 (Consolidated)

Court of Appeal (1st App. Dist., Div. 3) 1/Crim. No. 23780

Supreme Court Crim. No. 22560

Court of Appeal (1st App. Dist., Div. 4) No. A017265

Contra Costa County Municipal Court
(Walnut Creek-Danville) No. 31381-7

24 Jul 1980 Complaint Filed

13 Aug 1980 Plea Entered, "Not Guilty"

26 Feb 1981 Motion for Pre-Trial Discovery and
Alternative Motion to Exclude Results
of Intoxilyzer Filed

9 Jun 1981 Motion to Suppress Denied
Case Submitted on Police Report
Found Guilty

9 Jul 1981 Sentenced: 18 months probation, \$355 fine,
\$108 penalty, must participate in Drinking
Driver Program

21 Jul 1981 Notice of Appeal Filed

Contra Costa County Municipal Court
(Walnut Creek-Danville) No. 32153-9

9 Oct 1980 Complaint Filed

20 Oct 1980 Plea Entered, "Not Guilty"

18 Feb 1981 Motion for Pre-Trial Discovery and
Alternative Motion to Exclude Results of
Intoxilyzer Test Filed

9 Jun 1981 Motion to Suppress Denied
Case Submitted on Police Report
Found Guilty

9 Jul 1981 Sentenced: 18 months probation, 48 hours
county jail, \$355 fine, \$108 penalty, must
participate in Drinking Driver Program

21 Jul 1981 Notice of Appeal Filed

Contra Costa County Superior Court
Nos. 25717 & 25718 (Consolidated)

4 Dec 1981 Order of Conviction Affirmed, Certified to
Court of Appeal

Court of Appeal (1st App. Dist., Div. 3) 1/Crim. No. 23780
30 Dec 1981 Certification Denied

Supreme Court Crim. No. 22560

9 Apr 1982 Habeas Corpus Petition Filed
28 Apr 1982 Order to Show Cause Issued; Returnable in
Court of Appeal, Division 4

The People of the State of California
v. Gale Bernell Berry

Contra Costa County Municipal Court
(Walnut Creek-Danville) No. 29684-8

Contra Costa County Superior Court No. 25592
Court of Appeal (1st App. Dist., Div. 3) 1/Crim. No. 23780

Supreme Court Crim. No. 22517

Court of Appeal (1st App. Dist., Div. 4) No. A017266

Contra Costa County Municipal Court
(Walnut Creek-Danville) No. 29684-8

4 Feb 1980 Complaint Filed
20 Mar 1980 Plea Entered, "Not Guilty"
5 Sep 1980 Motion for Discovery, Memorandum of
Points & Authorities in Support of Motion
for Discovery, Declaration in Support of
Motion for Discovery Filed
20 Nov 1980 Motion to Exclude Results of an Intoxilyzer
Test & Points & Authorities in Support Filed
28 Apr 1981 Motion to Suppress Denied
Case Submitted on Police Report
Found Guilty
19 May 1981 Notice of Appeal Filed

Contra Costa County Superior Court No. 25592

4 Dec 1981 Order of Conviction Affirmed; Certified
to Court of Appeal

Court of Appeal (1st App. Dist., Div. 3) 1/Crim. No. 23780
30 Dec 1981 Certification Denied
28 Apr 1982 Order to Show Cause Issued; Returnable
in Court of Appeal, Division 4

II

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Attorneys for Defendant

MUNICIPAL COURT OF CALIFORNIA, COUNTY
OF SONOMA

No. 78532 TCR

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs,
vs.

ALBERT WALTER TROMBETTA,
Defendant.

**REQUEST AND DEMAND FOR DISCLOSURE
AND INSPECTION OF EVIDENCE**

(Filed March 4, 1981)

To GENE L. TUNNEY, District Attorney of Sonoma
County, California:

ALBERT WALTER TROMBETTA, Defendant herein, respectfully requests and demands that you disclose

to Defendant or his counsel, and permit them, or either of them, to inspect, copy, hear, examine, and analyze, not later than March 16, 1981, any and all evidence favorable to said Defendant or relevant or material to the guilt, innocence, or punishment of said Defendant, known to you or which by the exercise of due diligence should be known to you, and which is or are in your possession, custody, or control or accessible to you or other law enforcement officers or persons from you can obtain same.

The items so requested to be disclosed and inspected, copied, heard, and examined include, but are not limited to, the following:

See Exhibit "A" attached hereto and made a part hereof.

This request and demand shall be deemed continuing so as to require you to supply any further evidence relevant or material to Defendant's guilt, innocence, punishment and items of a like nature as requested above, between the time you comply with this request and demand until any sentence may be imposed on Defendant in this proceeding.

If you do not comply with this request by the above-stated time, a motion will be made to compel compliance with this request and demand and for sanctions to be imposed for non-compliance.

This request and demand is made pursuant to *Brady v. Maryland* (1963) 373 US 83, 83 S.C.T. 1194, 10 LEd2d 215, and other related cases, *Joe Z. v. Superior Court* (1970) 3 C3d 797, 91 CR 594, 478 P2d 26, *In re Ferguson*

(1971) 5 C3d 525, 96 CR 594, 487 P2d 1234, *People v. Hitch* (1974) 12C3d 641 and other pertinent cases.

Dated: March 4, 1981.

DEMEO & DEMEO
/s/ JOHN F. DEMEO

Attorney for Requesting
Defendant

People v. Trombetta

EXHIBIT "A"

1. Arrest Investigation Report;
2. Results of breath test given to determine alcoholic content in the blood of Defendant, including the read-out print documenting the results thereof;
3. Any and all breath samples of Defendant taken at or about the time the breath test was administered to Defendant at the Sonoma County Jail on January 31, 1981;
4. All test ampules containing breath samples of Defendant taken at or about the time the breath test was administered on Defendant at the Sonoma County Jail on January 31, 1981;
5. All simulator samples and solutions and compounds used to calibrate the subject intoxilyzer machine used by the County of Sonoma, on January 31, 1981;
6. All simulator samples and solutions and compounds used to calibrate the intoxilyzer machine used by

the County of Sonoma, on January 31, 1981, January 30, 1981, and January 29, 1981;

7. Any and all records, documents, correspondence, repair orders, and memorandum regarding the maintenance, repairs and calibration of the intoxilyzer machine used by the County of Sonoma to render the breath test to Defendant, for the period November 1, 1980, through January 31, 1981.

GENE L. TUNNEY, DISTRICT ATTORNEY

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Attorney for The People

MUNICIPAL COURT OF THE STATE OF
CALIFORNIA, COUNTY OF SONOMA
COURT NO. 78532 TCR

D.A. NO. 40261

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

ALBERT WALTER TROMBETTA,

Defendant(s).

POINTS AND AUTHORITIES IN OPPOSITION TO
DEFENDANT'S MOTION FOR DISCLOSURE AND
INSPECTION OF EVIDENCE.

(3/18/81 9:30 a.m. No.4)

(Filed March 13, 1981)

INTRODUCTION

All legally discoverable files, notes and memorandum within the District Attorney's files have been in the past, and are always now, open to the inspection of each defense counsel in this matter who has in fact declared himself to be the general counsel of said defendant. All items in physical evidence now in the possession or under the control of the District Attorney's Office are open for inspection during office hours and arranged as mutually convenient by the attorneys. Therefore, the People do not oppose discovery relative to requests made, except as stated herein.

The subjects of the defendant's requests No. 3 and No. 4 are nonexistent. When dealing with the Omieron Intoxilyzer, neither the breath samples nor test ampules are retrievable. Requests No. 5 and No. 6 should be limited to the available records of the County Crime Lab. Request No. 7 is unduly burdensome and should be limited to the available records, one week prior to the test and two weeks subsequent.

ARGUMENT

The defendant may not seek discovery indiscriminately. He must show that it is useful or relevant to his case. *Kelvin L. v. Superior Court* (1976) 62 Cal.App.3d 823; *Cadena v. Superior Court* (1978) 79 Cal.App.3d 212.

Here the subject matter which the defendant seeks is nonexistent in requests No. 3 and No. 4. The validity of the use of the Omicron Intoxilyzer and the inability to produce such samples was upheld in *People v. Miller* 52 Cal. App.3d 666.

The only element reducible to possession was the printout card, which has been preserved. The machine itself remains available. It and the frequent testings required by regulations of the Department of Health are available for discovery and possible impeachment . . . The intoxilyzer has been subjected to rigid scrutiny and testing by a state agency qualified in this technical field. It has been approved for use under the detailed regulations prescribed by that agency. Substantial numbers of the intoxilyzer have been purchased by the State Department of Justice and by many counties. *People v. Miller* (supra) at page 670.

Requests No. 5 and No. 6 are overly burdensome. The defendant seeks the actual samples, when the results of tests on these samples are readily available. The extent of a motion for discovery by a defendant rests in the sound discretion of the trial court, which may order discovery in the interests of justice. *Hill v. Superior Court* (1974) 10 Cal.3d 812. The People make available all records pertaining to the samples requested. There are actual test results concerning these samples. These tests measure the quality of the samples against their legal requirements. These are available; the defendant has shown no need for further testing!

Request No. 7 seeks production of an unreasonable long period of records. A three month period is far beyond the material necessary. The People now, as always, make available the maintenance and calibration records

for the period one week preceding and two weeks subsequent to the subject test. Here again the People rely on the discretion of the trial court as stated in *Hill* (*supra*). The above-mentioned records are available as a matter of standard procedure. The defendant's request goes beyond a feasible limit.

The People request that the defendant's motion be limited to the standards recited herein.

DATED: March, 1981.

Respectfully submitted,

GENE L. TUNNEY,
DISTRICT ATTORNEY

/s/ James T. Lee
Deputy District Attorney

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MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SONOMA

No. 78532 TCR

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs,
vs.

ALBERT WALTER TROMBETTA,
Defendants.

NOTICE OF MOTION FOR SUPPRESSION AS EVIDENCE, MOTION IN LIMINE AND FOR PROTECTIVE ORDER, POINTS AND AUTHORITIES, SUPPORTING DECLARATIONS AND OFFER TO STIPULATE.

Date of Hearing: March 26, 1981
Time: 9:00 a.m., Department 3

(Filed March 23, 1981)

TO GENE L. TUNNEY, District Attorney of Sonoma County, State of California:

Please take notice that on March 26, 1981 at 9:30 o'clock a.m., or as soon thereafter as the matter can be heard, at the courtroom of Department No. 3 of the above entitled Court, at the Hall of Justice in the City of Santa Rosa, County of Sonoma, State of California, pursuant to Section 1538.5 of the Penal Code of the State of California and pursuant to all other provisions of law, defendant will, and does hereby, move the Court for an order directing that the test results of the Intoxilyzer breath test of defendant be suppressed as evidence against defendant in any further proceedings herein.

This motion is made on the grounds that:

1. The failure to provide the defendant with a testable sample of his breath is discriminatory and is a denial of due process of law in contravention of the *Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7 and 13 of the California Constitution*.

2. That the failure to advise defendant that there would be no breath sample preserved as evidence and/or for retesting is discriminatory and is a denial of due pro-

cess of law in contravention of the *Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7 and 13 of the California Constitution.*

3. That the failure to preserve the simulator samples and solutions and compounds used to calibrate the Intoxilyzer machine used by the County of Sonoma on January 31, 1981, before the defendant was administered the test, is discriminatory, and is a denial of due process of law in contravention of the *Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7 and 13 of the California Constitution.*

This motion is based on this notice, the pleadings, records, and files in this proceeding, the attached memorandum of points and authorities, and the attached supporting declarations of ALBERT WALTER TROMBETTA and JERRY W. CURRY and any other oral or written evidence and declarations that may hereinafter be offered herein, and the Offer to Stipulate.

DATED: March 20, 1981.

DeMEO & DeMEO

/s/ JOHN F. DeMEO

Attorneys for Defendant

ALBERT WALTER

TROMBETTA

(Caption Omitted)

POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO SUPPRESS, MOTION IN LIMINE AND
FOR PROTECTIVE ORDER

INTRODUCTION

In this case, which charges defendant with a violation of a major misdemeanor with severe consequences if convicted, the people have conceded in a document entitled "Points and Authorities in Opposition to Defendant's Motion for Disclosure and Inspection of Evidence" filed on March 13, 1981, that they have *no breath samples of defendant nor do they have test ampoules containing samples of defendant's breath*, and apparently do not have simulator samples used to calibrate the Intoxilyzer machine, although defendant submitted to a breath test on his arrest on January 31, 1981. Defendant has no opportunity therefore to retest the prosecution's chemical analysis.

The gist of this Motion to Suppress, Motion in Limine and for Protective Order is, that since the legislature requires the preservation of *blood* and *urine* samples for retesting should the defendant request same, the failure to similarly require preservation of and/or the actual failure of law enforcement to preserve a *breath sample* for retesting is *discriminatory, denies equal protection of law and denies due process of law*, thereby denying a fair trial to a defendant, accused of driving while under the influence of intoxicating liquor in alleged violation of Section 23102 (a) of the Vehicle Code, *unless the breath test results are suppressed*.

Further, that the failure to advise a defendant who has chosen to take a breath test, before the test is ad-

ministered, that no breath test sample is being preserved for retesting, so as to allow him to either waive the preservation of a sample of his breath, or to allow him a true and informed choice of a blood or urine test in lieu of a breath test, is likewise discriminatory and denies such a defendant equal protection and due process of law unless the results of said test are suppressed.

THE WITHIN MOTION IS FOUNDED NOT ONLY ON PENAL CODE SECTION 1538.5 BUT ALSO SAID MOTION IS SANCTIONED BY THE COMMON LAW.

The very recent case of *People vs. Superior Court (Scott)* (1980) 112 C.A.3d 602, clearly sanctions a common law pre-trial motion to suppress. Thus, the moving party herein has several alternative bases for this motion, i.e. Penal Code Section 1538.5 and the common law suppression motion. In addition, Section 352 of the Evidence Code gives this honorable Court wide latitude in the exercise of discretion to exclude evidence.

TWO LANDMARK DECISIONS OF THE CALIFORNIA SUPREME COURT REQUIRE THE SUPPRESSION OF THE RESULTS OF THE BREATH TEST IN THIS CASE.

In *People vs. Hitch* (1974) 12 C.3d 641, the California Supreme Court held that where the test ampoule and reference ampoule and bubbler tube of a Breathalyzer test taken of the defendant in a case charging violation of Vehicle Code Section 23102(a), were discarded, the result of the test would be excluded from evidence. ". . . unless the prosecution can show that the governmental agencies involved have established, enforced and attempted in good

faith to adhere to rigorous and systematic procedures designed to preserve the test ampoule and its contents and the reference ampoule used in such chemical test. The prosecution shall bear the burden of demonstrating that such a duty to preserve the ampoules and their contents has been fulfilled." (at Page 652-653) (Emphasis supplied)

Hitch (supra) goes on to hold that a failure to meet that burden requires the results of the test to be excluded from evidence.

In the case at bar there was no effort, *no intention to collect, or any attempt to collect breath samples of defendant for preservation for retesting*, nor was there any effort to retain the simulator samples and/or solutions and compounds used to calibrate the subject Intoxilyzer machine used by the County of Sonoma on January 31, 1981 prior to testing this defendant on that same date. Also, no attempt or effort was made to advise defendant that no sample of his breath was being retained and thus as a result of these failures the spirit of *Hitch* (supra) has been violated and thereby dictates suppression of the test and its results.

The second of the landmark decisions by the California Supreme Court which compels suppression of the breath test results herein is *People vs. Nation*, (1980) 26 Cal.3d 169, which made the following rulings and clarifications of *Hitch* (supra):

1. "Yet it is well established that the suppression by the State of evidence favorable to an accused after a request therefor, violates due process, irrespective of the good faith of the prosecution *Brady vs. Maryland* (1963) 373 U.S. 83, 87, (10 L. Ed. 2d 215, 218, 83 S. Ct. 1194].)." At page 175.

2. "In *People vs. Hitch* (174) 12 Cal. 3d 641, 650 [117 Cal. Rptr. 9, 527 P.2d 361], we held that the obligation to disclose the existence of material evidence places on the state a correlative duty to preserve such evidence *even without a request therefor*, and directed that in the future law enforcement agencies take reasonable measures to ensure its adequate preservation." (Emphasis supplied)

Foot Note 1. "The present case is typical of the problem covered by *Hitch*, in that defendant here was not charged at the time the police physician obtained the semen sample. *If a request were a condition to the duty to preserve, the duty might not arise until it became impossible of performance.*" At page 175. (Emphasis supplied)

3. "As in *Hitch*, we are not in a position to examine the suppressed evidence to decide whether or not it is material. However, evidence lost to the defense because of its destruction by the authorities *will be deemed material for the purpose of triggering the due process concerns of Hitch if there is a reasonable possibility that it would be favorable to the defendant on the issue of guilt or innocence.* (12 Cal. 3d at P. 649.) Contrary to the prosecution's contention, the rationale of *Hitch* is thus not limited to circumstances in which the destroyed evidence proves a necessary element of the crime." At Page 176. (Emphasis supplied)

Nation (supra) imposes a duty to preserve any body fluid, body vapor, or other substance taken from a defendant, for retesting purposes, for the obvious reason that the preservation would admit of retesting by an accused defendant's own experts. The results of such retesting could be used to impeach the prosecutions witnesses and could possibly completely exonerate the defendant.

In the instant case the prosecution *took* the breath sample and although it could have inexpensively preserved

a sample for retesting, it did not do so and the defendant was not informed that no sample would be preserved and the defendant thereby lost any opportunity to counter the devastating evidence of the results of the breath test which under the Vehicle Code would give rise to a presumption of guilt of the charge of 23102(a), if the result of the test is at or exceeds a reading of .10 percent by weight of alcohol in the person's blood. The results of the tests in this case trigger the presumption of guilt. The results of the tests herein were .18, .19.

The failure to collect a sample of breath for retesting, makes it legally impossible for this defendant to *rebut* the presumption created by law that he was guilty. Yet, had defendant chosen a blood or urine test, the law *requires* the preservation of a sample for retesting. This is blatant discriminatory legislation on its face. There can be no reasonable or rational distinction between the blood, urine and breath tests, and why samples for retesting are required in two of the three tests available to a defendant, but not for the breath test.

The chemical analysis of any of the three tests gives rise to the same presumptions under Vehicle Code Section 23126 and therefore that which is fair as to two of the tests must apply to all to escape constitutional infirmity.

As will be seen by the evidence to be presented on this motion, the state of the art was, at the time of defendant's arrest, and had been for several years, that samples of a defendant's breath, taken at the time a blood alcohol breath test is given, *can be preserved and can be so preserved at a nominal cost*. In fact the cost of taking breath samples for retesting is less costly than is required to preserve urine or blood samples for retesting.

In fact, in this very county, prior to the advent of the State crime lab concept, certain law enforcement agencies had followed the procedure of collection of samples of breath for submission for testing by a private contractor lab and for retesting at the defendant's behest.

THE EVIDENCE WILL SHOW THAT THE STATE DEPARTMENT OF HEALTH SERVICES HAD APPROVED AN INEXPENSIVE, EASY TO OPERATE UNCOMPLICATED INSTRUMENT IN 1973 WHICH WAS AND IS DESIGNED FOR USE INDEPENDENTLY OF ANY OTHER MACHINE, FOR BREATH ALCOHOL COLLECTION AND ANALYSIS, WHICH MACHINE ALLOWED THE COLLECTION OF SAMPLES FOR LATER TESTING AND ANALYSIS.

Section 1221.3(e) of the Regulations relating to Forensic Alcohol Analysis and Breath Alcohol Analysis, contained in Title 17 of the California Administrative Code provides that only such instruments as have been approved by the California State Department of Health Services shall be used for breath alcohol analysis in this State.

As early as 1973 the California State Department of Health Services approved a device known as an "Intoximeter Field Crimper—Indium Tube Encapsulation Kit." The device allows the collection of breath samples for breath alcohol analysis at a later time than the time of collection.

This device was, is, and has been available at a reasonable cost for several years. It is simple to operate and would give a defendant the Constitutional right he or she may be entitled to, to wit: retesting.

There are other simple, inexpensive methods which would allow the taking of samples of a persons breath for later breath alcohol analysis which can be used in conjunction with the Intoxilyzer machine used by the County of Sonoma.

The evidence will amply illustrate that the samples collected by several available means can be tested at a subsequent time and that the results of the later tests are *reliable*.

THE PROSECUTION IN SONOMA COUNTY HAS IN EFFECT "SUPPRESSED" MATERIAL EVIDENCE BY ITS FAILURE TO PRESERVE BREATH SAMPLES FOR LATER ANALYSIS.

It is axiomatic that samples of blood, breath, or urine, are material to the proof of drunk driving charges. As pointed out hereinabove certain presumptions arise at certain blood alcohol levels. (See Vehicle Code § 23126). The test results, if admissible, trigger certain presumptions relating to guilt.

When one looks at simple analogies it becomes obvious that the failure to preserve breath samples is tantamount to suppression of evidence by law enforcement, which is, contrary to concepts of due process or as others have spoken of it, contrary to fair play

Take the following three examples:

1. Let us suppose that a bullet is removed from a murder victim, analyzed by the governmental crime lab for the purpose of connecting it up to the defendant's gun and then thrown away or destroyed before defendant can have it analyzed.

2. Suppose again that fingerprints found at a burglary scene are rolled and put on a card, analyzed and compared with defendants and after comparison the card is thrown away before the defendant has an opportunity to have them analyzed.

3. Suppose that a defendant is accused of murder by poison and the liquid is retrieved and analyzed and found by the prosecution to be poison and the substance is thrown away before allowing an analysis by the defendant.

In each of the above situations, one can readily say the defendant has been denied due process. *Hitch* (*supra*) and *Nation* (*supra*) tell us that there is something inherently unfair and wrong about the *non-preservation of material evidence*.

In the instant case, law enforcement has deliberately, consciously, and voluntarily chosen to conduct their own breath test on an Intoxilyzer, *knowing that it does not preserve the breath sample taken and in spite of this knowledge has made no effort, although easy and inexpensive to do so, to preserve breath samples for retesting*.

It is inherently wrong, unfair and patently and facially unconstitutional to allow the prosecution to use the *results* of a test performed on *body fluid or vapor* to trigger certain presumptions of guilt without the most basic of safeguards, viz. the preservation of a sample of that fluid or vapor for retesting by defendant to verify or refute the test results contended for by the prosecution.

The evidence will show in this case that the Intoxilyzer machine used by the prosecution to perform the breath test in this case is *far from foolproof*. It is woefully non-specific, i.e. reacts false positively to a number of sub-

stances which are not ethanol. The Intoxilyzer can also be inadvertently or advertently tampered with, and can be improperly calibrated, all of which shortcomings are the fundamental and basic reasons why the test results on such a machine must be suppressed in the absence of a retestable preserved breath sample.

THE HONORABLE JOSEPH R. LONGACRE, JR., JUDGE OF THE MUNICIPAL COURT OF CONTRA COSTA COUNTY HAS RULED THAT THE FAILURE TO PROVIDE THE DEFENDANT WITH A SAMPLE OF HIS BREATH FOR PURPOSES OF RETESTING AS IS DONE IN THE CASE OF BLOOD AND URINE, DISCRIMINATES AND DENIES THE DEFENDANT A FAIR TRIAL PREVENTING HIM FROM ENJOYING THE DUE PROCESS OF LAW HE IS GUARANTEED.

Although this Court is not bound by another Municipal Court Judge's decision, it is submitted that Judge Longacre's decision is what *Hitch* (supra) and *Nation* (supra) are all about.

A complete copy of Judge Longacre's decision is marked Exhibit "A" and is attached hereto for the convenience of the Court and counsel. It is patently clear that Judge Longacre's analysis of the problem presented herein is a sound one and his decision should be followed.

That another trial judge's opinion may be properly cited to a Court in an unrelated case for its persuasive value is axiomatic. See 6 *Witkin California Procedure* (1971) Section 659, 4574-4575.

THE SUPREME COURT OF COLORADO RELYING ON PEOPLE V. HITCH (SUPRA) HAS CORRECTLY RULED THAT IN ALL CASES WHERE

A DEFENDANT ELECTS TO SUBMIT TO A BREATH TEST TO DETERMINE HIS BLOOD ALCOHOL LEVEL, HE MUST BE GIVEN A SEPARATE SAMPLE OF HIS BREATH AT THE TIME OF THE TEST IF THAT TEST IS TO BE USED AS EVIDENCE.

In the case of *Garcia vs. The District Court* (1979) 589 P.2d 924 the Colorado Supreme Court had before it the precise question posed in the instant case. Colorado has a statutory scheme identical to that in California, in that the same chemical tests are available to a defendant; the identical presumptions apply given certain levels of alcohol in the blood as analyzed by blood, urine or breath tests and the regulations pertinent to chemical analysis provided for preservation of blood and urine samples for the defendant but did not provide for preservation of breath samples.

In *Garcia* (supra) as here no breath sample was preserved and the simulator samples were unavailable. There, as here, there was no requirement to retain breath samples under Colorado State Board of Health Regulations, but there was such a requirement as to blood and urine.

The full text of the *Garcia* (supra) case is attached hereto marked Exhibit "B" and made a part hereof by reference.

Several holdings were made by the Colorado Court which it is respectfully submitted apply to this case. They are as follows:

1. "Preservation of the blood, urine, or breath which formed the basis for the conclusion that a person was operating a vehicle while under the influence of intoxica-

ting liquors is essential in view of the presumption that arises from the test." At Page 926;

2. ". . . procedures exist which permit the preservation of a Breathalyzer sample for use by the defense." At Page 926;

3. "The breath samples requested by the defendants are obviously material to the proof of the drunk driving charges." At Page 929;

4. "It is not necessary for a defendant to demonstrate that the evidence he seeks to discover, but which is no longer available for examination by the Court, would have been favorable to him, *People vs. Harmes* 38 Colo. App. 378, 560 P.2d 470 (1976), so long as that evidence is not merely 'incidental' to the prosecution's case or to the defendant's affirmative defense. *People vs. Bynum*, 192 Colo. 60, 556 P.2d 469 (1976). It is sufficient that the material requested 'might' be 'favorable' to the accused.' *United States vs. Bryant*, 142 U.S. App. D.C. 132, 142 N. 21, 439 F.2d 642, 652 N. 21 (D.C. Cir. 1971)." At Page 929.

5. "The failure of the State to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by State agents, is tantamount to suppression of that evidence. It is incumbent upon the State to employ regular procedures to preserve evidence which a State agent, in the regular performance of his duties, could reasonably foresee 'might be' 'favorable' to the accused." At Pages 929-930. (Emphasis supplied)

Basically, *Garcia* (supra) holds as does *Hitch* (supra) and *Nation* (supra).

In California, (like Colorado), *Vehicle Code Section 23126* imposes certain presumptions based upon chemical analysis of blood or urine or breath. *Absolutely no distinction is made as to the presumption which comes into play based upon the type of test taken by a defendant.*

California Vehicle Code Section 13353 gives the person arrested the absolute right to have a blood, breath or urine test and he is required to be advised of his choice by law enforcement.

The refusal to submit to a test results in a suspension of ones driver's license for a period of 6 months.

The very language of California Vehicle Code Section 13354 allows the person submitting to one of the three tests to have a retest. The obvious intent of the legislature is to have a sample available for retest, otherwise there can be no retest and the statute would be meaningless.

There can be no freedom of choice *unless the defendant is informed* that if he chooses the breath test, no sample will be preserved. He must be given the right to choose any of the tests that will preserve to him the right to retest. Otherwise, he has not given and informed consent nor has he had a free choice knowing all the facts, and in such case the results of the test must be suppressed in fairness. It can be properly argued that an unreasonable search and seizure has been made of defendant's person and body vapor when he was not properly informed and advised by law enforcement.

Title 17, Sections 1219 through 1219.3 only require blood and urine samples to be maintained for analysis by the defendant. Thus, a defendant choosing a breath test is *denied equal protection for no rational reason.*

Perhaps, at the time the Administrative Code Regulations were adopted, there was no approved method of collecting breath samples. Such has not however been the case since 1973 as pointed out at an earlier point in this memorandum.

THE DISCRIMINATORY LEGISLATION (I.E. STATE ACTION), FOUND IN TITLE 17 WHEREIN IT REQUIRES PRESERVATION OF BLOOD AND URINE BUT NOT BREATH IS A LAW SCHOOL CLASSIC EXAMPLE OF A VIOLATION OF EQUAL PROTECTION.

In *Reed vs. Reed* (1971) 404 U.S. 71, 92 S. Ct. 251, our United States Supreme Court said:

"The Equal Protection clause . . . denies to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'" quoted in *Brown vs. Merlo* (1973) 8 C 3d 855, 861.

In applying *Reed* (*supra*) to the instant case, it is obvious that one group of individuals who choose a breath test as opposed to a blood or urine test, are given a *different treatment* as to their right to a body sample for retesting even though the body sample in question, (breath) is just as vital to the case as blood or urine samples and in spite of the fact that the breath can be *easily* and *inexpensively* preserved for retesting.

It is difficult to conceive how any sound thinking person can argue against the fact that a defendant taking a

breath test is denied equal protection where no sample is preserved.

It is neither reasonable nor consistent for law enforcement to ignore the fact that science has had an approved, reasonable, simple, inexpensive way to preserve breath samples for retesting, at least since 1973. Law enforcement cannot be allowed to defend their laxity in preserving breath samples on the basis that Title 17 "doesn't require it."

Vehicle Code Section 13354(c) which provides that:

"Upon the request of the person tested full information concerning the test taken at the direction of the peace officer shall be made available to him or his attorney", can be read to override Title 17.

This section certainly can be read to intend that "*full*" information including breath samples be made available to a defendant. Otherwise, the section has little or no meaning.

PEOPLE VS. MILLER IS INAPPLICABLE TO THE ISSUES IN THIS CASE BY ITS OWN LANGUAGE.

The prosecution will undoubtedly argue that *People vs. Miller* (1975) 52 Cal. App. 3d 666, upholds the use of the Intoxilyzer machine notwithstanding that it does not collect breath samples for retesting.

It must be pointed out to the Court that *Miller* (*supra*), by the very language in the decision, does not reach the issues of this case and of course, does not and cannot overrule *Hitch* (*supra*).

In *Miller* (supra) the Court said at Page 670:

"In view of our determination of the basic issue, we do not elucidate the obvious point that *Hitch*, by its express terms, applies only to tests of breath administered after its filing, October 21, 1974. All the tests in the three cases before us were conducted before that date."

THE CONSEQUENCES OF A CONVICTION OF DRUNK DRIVING ARE EXTREMELY SERIOUS.

Drunk driving is a major misdemeanor. The consequences of conviction are potentially horrendous. Especially is this true where a prior is pleaded and proved. In addition to fines, jail sentences may be imposed as can driver's license suspensions. Second convictions within five years requires at least 48 hours jail time and could result in a 1 year jail term, and up to \$1,000.00 in fines and a mandatory 1 year license suspension. Greater consequences flow from additional convictions.

Additional consequences flow from a drunk driving conviction, such as higher insurance premiums and difficulty in obtaining insurance.

As Judge Longacre stated in his opinion:

"This Court wants it understood that it is not condoning leniency to the drunk driver, but it is insisting that every accused drunk driver who is being exposed to the *drastic consequences of a conviction* be afforded reasonable opportunity to employ a non-discriminatory defense in his behalf. As Justice Mosk indicated in the *Nation* decision, the integrity of our entire judicial system is dramatically involved." (Emphasis supplied)

This is not a case wherein the Court is being asked to dismiss the case at this time. The prosecution may pro-

ceed with their case sans the test results if it chooses to do so subject to proper challenge.

This is a case where the Court must suppress the evidence based on constitutional standards which invoke fair play. This is not a case which admits of technical or fine distinctions. It is clear under the law that the test results must be suppressed.

DATED: March 20, 1981.

Respectfully submitted,

DeMEO & DeMEO

/s/ John F. DeMeo

Attorneys for Defendant

(Caption Omitted)

DECLARATION OF
ALBERT WALTER TROMBETTA
IN SUPPORT OF MOTION

I, ALBERT WALTER TROMBETTA, declare:

1. I am the defendant in the above entitled proceeding;
2. That on or about January 31, 1981 I resided at 4741 Bridle Trail Drive, Santa Rosa, California;
3. On or about January 31, 1981 I was arrested by an Officer of the California Highway Patrol for an alleged violation of California Vehicle Code Section 23102(a);
4. On January 31, 1981, at the Sonoma County Jail, I was administered a breath test on an intoxilyzer machine. No other type of chemical test was administered to me on January 31, 1981 by the California Highway Patrol, or any other law enforcement agency;

5. At no time on January 31, 1981 did any law enforcement officer, or any other person advise me that there would be no sample of my breath preserved.

6. At no time on January 31, 1981, did any law enforcement officer or any other person advise me that no means had been provided by the California Highway Patrol, County of Sonoma, or any other law enforcement agency in this county, for the preservation of a sample of breath.

7. At no time on January 31, 1981, did any law enforcement officer or any other person advise me prior or after the taking of the breath test on the intoxilyzer machine, that there would be no sample of my breath retained for retesting;

8. I would not have submitted to the breath test on the intoxilyzer machine had I been informed that no sample of my breath would be obtained or preserved for retesting;

9. Had I been informed that no sample of my breath would be obtained or preserved for retesting, I would have requested a blood or urine test so that I could have obtained a sample thereof for retesting by an expert of my own choice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 20, 1981, at Santa Rose, California.

/s/ ALBERT WALTER
TROMBETTA

(Caption Omitted)

OFFER OF DEFENDANT TO STIPULATE

Defendant ALBERT WALTER TROMBETTA, by and through his attorneys DeMEO & DeMEO, offers to stipulate to any or all of the hereinbelow:

1. That ALBERT WALTER TROMBETTA in connection with his arrest was administered a breath test on January 31, 1981 on an Intoxilyzer machine, Model No. 4011AW at the Sonoma County Jail, Santa Rosa, California;
2. That at no time on January 31, 1981, either or before or after said breath test was administered to ALBERT WALTER TROMBETTA did any law enforcement or peace officer advise ALBERT WALTER TROMBETTA verbally or in writing that there would be no sample of his breath preserved for retesting or for any purpose;
3. That on January 31, 1981, and for a period of at least 3 years prior to January 31, 1981, no law enforcement agency within the County of Sonoma provided any means for the preservation of a sample of breath for retesting of breath samples of individuals submitting to Intoxilyzer tests at the Sonoma County Jail, in conjunction with arrests for suspicion of driving a vehicle under the influence of alcoholic beverages.
4. That on January 31, 1981, and prior to the submission by ALBERT WALTER TROMBETTA to a breath test at the Sonoma County Jail, certain law enforcement officers recommended and suggested to ALBERT WALTER TROMBETTA that take the breath test as the choice of tests available to him to determine the alcoholic content in his blood.

5. That on January 31, 1981, and for a period of at least 7 years prior thereto, there was and is available a device for the capturing and preservation of breath samples which samples may be accurately tested within a reasonable time thereafter for alcoholic content of the blood of the donor of the sample.

6. That prior to the time that the California Department of Justice Bureau of Forensic Services was delegated the task of testing and/or interpreting the results of breath tests on the Intoxilyzer machine located at the Sonoma County Jail, a private firm performed the testing and/or interpretation of said tests and that certain law enforcement agencies with law enforcement jurisdiction within the County of Sonoma submitted breath samples to said private contractor laboratory in tubes for analysis and that sufficient samples were forwarded to said laboratory so as to allow a defendant an opportunity for independent retesting of the breath sample on request.

7. That none of the simulator samples, solutions or compounds or any part of said samples, solutions or compounds used to calibrate the Intoxilyzer machine prior to the testing of ALBERT WALTER TROMBETTA have been retained by the People or any law enforcement agency.

8. That on January 31, 1981, those persons who chose a breath test in the County of Sonoma by any machine device operated by law enforcement officers in said county, were not provided with nor was there available to such persons, a sample of breath to be used for retesting.

9. That on January 31, 1981, and for a period of at least three years prior thereto, at least 80% of all chemical

tests submitted to by any driver suspected of being under the influence of intoxicating liquor, is and was the breath test.

10. That the law of the State of California in Vehicle Code Section 23126 makes no distinction among the breath, blood or urine test as it relates to the presumption and burden of proof in connection therewith.

11. That the law of the State of California on January 31, 1981 was and now is that the failure to preserve samples of blood or urine taken of a defendant suspected of driving a vehicle under the influence of intoxicating liquor, requires the suppression of the results of the test on a proper motion made to the Court.

12. Subject to all appropriate appellate review, a ruling by the Court herein will be binding on the People at Trial.

Any or all of the above stipulations are offered on the hearing of this motion or at trial in the interest of preserving the time of the Court and counsel.

DATED: March 20, 1981.

DeMEO & DeMEO
/s/ JOHN F. DeMEO
Attorneys for Defendant

DEMEO & DEMEO

DeMeo Building - 1022 Mendocino Avenue
Santa Rosa, California 95401
(707) 545-3232

Attorneys for Defendant

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SONOMA

No. 78532 TCR

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs,
vs.

ALBERT WALTER TROMBETTA,
Defendants.

DECLARATION OF JERRY W. CURRY
(Filed March 23, 1981)

I, JERRY W. CURRY, declare as follows:

1. My name is JERRY W. CURRY and my business address is 1041 4th Street, Santa Rosa, California;
2. I have a B.A. degree from San Jose State University in Medical Technology, Chemistry and Microbiology. My year of graduation from San Jose State University was 1961;
3. I am a Forensic Alcohol Supervisor duly qualified as such by the State of California to perform Forensic

Alcohol Analysis. I have been so qualified since December 21, 1970.

4. I have been associated with Central Pathology Laboratory, whose present address is 1041 4th Street, Santa Rosa, California, since June 1, 1969.

5. I am an officer, stockholder, and a member of the Board of Directors of Central Pathology Laboratory, a California corporation engaged in the science of, among other scientific studies, forensic alcohol analysis from human blood, urine and breath.

6. I am the lab manager of Central Pathology Laboratory.

7. I have personally performed forensic alcohol analysis in conjunction with my association with Central Pathology Laboratory, on human samples of blood, urine, and breath and have personally tested and analyzed well over 1,000 samples of blood, well over 1,000 samples of urine and well over 1,000 samples of breath from different humans for alcohol analysis.

8. From approximately 1970 to some date in 1975, Central Pathology Laboratory performed blood, urine and breath alcohol analysis on behalf of the District Attorneys office of the County of Sonoma in conjunction with said District Attorney's criminal law enforcement duties, which analyses were primarily involved with individuals suspected of driving motor vehicles while under the influence of alcoholic beverages in violation of the laws of the State of California.

9. From 1972 to a date in 1975, law enforcement agencies in Sonoma County, such as the Sheriff's Office,

California Highway Patrol and various City Police groups, used a scientific instrument known as an "Intoximeter Field Crimper-Indium Tube Encapsulation Kit" for the purpose of collecting breath samples in the field, of persons suspected of driving a vehicle under the influence of intoxicating beverages, where those persons requested a breath test. Various police stations throughout Sonoma County also had these instruments on hand at their various stations for collection of breath samples. The above described Intoximeter Field Crimper is designed as a capturing device for entrapment of alcohol in a breath sample for *later analysis*.

It is capable of being used in a stationary location or in a vehicle and the device operates by plugging it into a 110 volts receptacle or a cigarette lighter receptacle in a motor vehicle. The device and accompanying kit is simple to use and requires very little room to house same. No scientific background or knowledge is required to operate the device or capture breath samples.

10. The "Intoximeter Field Crimper-Indium Tube Encapsulation Kit" has been approved for use in California for use in breath alcohol analysis since *August 8, 1973*.

11. The Intoximeter Field Crimper referred to in this declaration and as is approved by the State of California, is designed to collect 3 samples of breath, *each of which may be separately analyzed at a time later than the moment of collection thereof*.

12. Between 1972 and a date in 1975, law enforcement personnel in Sonoma County who had collected breath samples with the Intoximeter Field Crimper would submit three samples of breath from each suspect in

Indium Tubes to Central Pathology Laboratory. The laboratory would in turn routinely analyze two of the three samples and retain the third sample intact for re-testing by the suspect, should a request for same be made by the suspect.

13. At all times mentioned herein, including the present date, Central Pathology Laboratory owned and utilized a "Gas Chromatograph Intoximeter Mark II". This instrument was approved by the State of California for Breath Alcohol Analysis in 1971 and to this day said instrument continues to be so approved. This instrument allows the *immediate* analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed and it also permits later analysis of breath samples which are collected with an Intoximeter Field Crimper-Indian Tube Encapsulation Kit. Both methods of breath alcohol analysis, i.e. the immediate analysis by direct expiration into the instrument and the *later analysis* from collected samples have been authorized in California for several years.

14. To my personal knowledge, breath alcohol analysis results from collected samples of breath using the aforesaid Intoximeter Field Crimper, have been admissible in Court as evidence in cases involving persons suspected of driving motor vehicles while under the influence of intoxicating liquor.

15. To my knowledge, the aforesaid Intoximeter Field Crimper-Indium Tube Encapsulation Kits are and have been readily available for purchase and use.

16. The Gas Chromatograph Intoximeter Mark II instrument is available for use in the Central Pathology

Laboratory at this time and will continue to be available for use in conducting breath alcohol analysis on a scientific reliable basis.

17. It is my considered opinion that breath samples which are properly collected with the Intoximeter Field Crimper-Indium Tube Encapsulation Kit may be readily and accurately tested and analyzed for alcohol content. Tests and experiments I have personally performed have indicated that a retained breath sample in an indium tube may be scientifically and reliably tested for up to 3 months after the collection of the breath sample.

18. An approved method of collecting breath samples for later analysis for alcohol content has existed since August of 1973. It is my opinion that law enforcement personnel in Sonoma County have had the capability of capturing and retaining said breath samples for the past several years had they desired to do so. The Intoximeter Field Crimper-Indium Tube Encapsulation Kit may be used separate and apart from any other instrument for the breath collection process and does not depend upon any other instrument for the collection of the breath sample.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 20, 1981, at Santa Rosa, California.

/s/ Jerry W. Curry

JUDGE LAWRENCE G. ANTOLINI
Municipal Court - Department Three
Hall of Justice
600 Administration Drive
Santa Rosa, CA 95401
Telephone: (707) 527-2571

NO. 78532 TCR
NO. 78402 TCR

MUNICIPAL COURT FOR THE
COUNTY OF SONOMA
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff,

vs.

MELINDA PIERSON BERTRAM,
ALBERT WALTER TROMBETTA,

Defendants.

RULING ON 1538.5 and OTHER MOTIONS

The court hereby denies the 1538.5 and stipulated 402 motion in the above-entitled cases. The court's decision is based upon the evidence and testimony admitted before it and also based upon the briefs and all cases cited by both the people and the defense. I therefore will not be reiterating all the above mentioned arguments and cases. I will comment, however, upon the most prevalent of the many issues presented. The first of these is a factual as well as a legal issue that must be addressed namely

whether or not the breath sample "collected" comes under the auspices of the Hitch and Nation mandates. The art of semantics for many years has been the subject matter of courses taught at many of the outstanding universities in the world. Indeed then, the interpretation and or interpolation of words can only be considered to be accurate, when taken in the light of all the surrounding circumstances of a particular situation. The verb "collect" or "gather together" may be either of a temporary or permanent nature. It appears to this court that from the testimony elicited and from the evidence submitted, that at best a state when using the 4011-W Intoxilizer unit, *temporarily* collects or gathers breath of a tested individual. The chamber which collects this breath contains it only for a period of time necessary to conduct an analysis on this breath. By the construction of the machine itself, namely that of having two or [i]fices, one for introduction and one for the expulsion of the sample, it appears to the court that the temporary control over the breath makes the ultimate dissipation and destruction of the sample an inherent and obvious consequence of using that particular intoxilzer unit. The argument that the state is in control of the breath and that by choosing to purge the sample, destroys it, is an argument that in the court's opinion is *reductio ad absurdum*. Mr. Murray, the defense witness, stated in substance, that the intoxilizer collects breath but not for later analysis and then must be purged in order to be usable again. Without an addition to the present intoxilizer unit it appears to the court that it would be impossible to exercise permanent control resulting in preservation of any sample. Therefore, it would appear to the court that the destruction of any temporar-

ily collected sample would not be through the actions or efforts of the state, but rather through the workings of the machine itself. Therefore, the court finds the cases of the Hitch and Nation are not violated where the state uses the above-described intoxilizer unit in that the state never had permanent possession of the sample, therefore had no election to make since on that unit permanent retention is impossible without modifications. The above referred to intoxilizer unit was approved by the State of California in 1973; further there have been improvements upon the basic unit until the present AW series. The court finds that the intent of the Legislature is therefore to accept the machine as it exists without any attachments which would permanently preserve the temporarily collected samples of breath, since these attachments have been available and yet there has not been withdrawal or qualification of the state approval of the intoxilizer.

Addressing now the question of whether the defendant has the right to be advised that if she takes the breath tests as presently given in Sonoma County, that she will not have a sample preserved. The court find that § 13353 of the Vehicle Code and subsequent sections are not constitutionally guaranteed, rather they are administrative policy with the immediate purpose to obtain the best evidence of the blood alcohol content of a person believed to be driving while under the influence of an alcoholic beverage. Further, the purpose of the above sections are to avoid the possible violence which could erupt if forcible tests were made upon a recalcitrant and belligerent inebriate in order to obtain the best evidence.

§ 1219.3 of Article 5, Title 17 CAC does not provide for a breath sample although 1219.1 and 1219.2 provide for the retention of blood and urine samples respectively. It has been argued by the defense that at the time of the regulations it was not possible to retain the breath. It appears to this court that in the time that has passed, the Legislature has had more than ample opportunity to amend this particular area of the law and yet the Legislature has knowingly and purposefully chosen not to mandate the retention of breath samples.

In summary the court then finds that the state in this case did not possess the breath sample in the sense and or context of the Hitch and Nation decisions and further that there is no constitutional requirement that defendant be advised of the fact that only two of the three tests have samples that are statutorily required to be preserved.

DATED: May 7th, 1981.

LAWRENCE G. ANTOLINI,
Judge of the Municipal Court

DEMEO & DEMEO

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(707) 545-3232
Attorneys for Defendant & Appellant

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SONOMA

No. 78532 TCR

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
vs.

ALBERT WALTER TROMBETTA,

Defendant.

STATEMENT ON APPEAL

(Filed June 11, 1981)

NOTICE IS HEREBY GIVEN BY APPELLANT ALBERT WALTER TROMBETTA that he intends to file a reporter's transcript herein of the evidence and proceedings in the above entitled case and does hereby make the said reporter's transcript a part of his statement on appeal.

GROUND OF APPEAL

1. The failure to collect and preserve a retestable breath sample of a defendant arrested for driving a vehicle in alleged violation of the California Vehicle Code Section 23102(a), after said defendant has chosen to take a breath test, is discriminatory, violates equal protection, and is a denial of due process in contravention of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7 and 13 of the California Constitution and such failure to collect and preserve said breath sample renders the results of said

breath test taken by the People subject to a suppression order and renders the results of said test inadmissible in evidence on the trial of such defendant.

2. The discriminatory legislation found in Title 17 of the Administrative Code wherein said code requires the preservation of blood and urine samples taken from a defendant, who has been arrested for driving a vehicle in alleged violation of the California Vehicle Code Section 23102(a), for the purpose of retesting, but does not require the preservation of a breath sample for retesting, is a violation of equal protection in contravention of the United States and California Constitutions, and renders the results of a breath test taken by the People subject to a suppression order and renders the results of said test taken by the People inadmissible in evidence on the trial of such defendant.

3. The failure to advise a defendant who has been arrested for driving a vehicle in alleged violation of California Vehicle Code Section 23102(a), after said defendant has chosen to take a breath test, but before said breath test is administered, that no breath sample is being preserved for retesting, so as to allow him the right to waive the preservation of a retestable sample of his breath, or to allow him a true and informed choice of a blood or urine test where retestable samples are preserved, is discriminatory; violates the equal protection clause and the due process clause of the United States and California Constitutions and renders the results of a breath test taken by the People subject to a suppression order and renders the results of said test inadmissible in evidence on the trial of such defendant.

4. All other grounds urged in the Court below in the moving papers filed therein and in the argument to

the Court found in the reporter's transcript are also urged on this appeal.

DATED: June 11, 1981.

Respectfully submitted,

DEMEO & DEMEO

/s/ John F. DeMeo

Attorneys for

Defendant and Appellant

Albert Walter Trombetta

PROOF OF SERVICE BY MAIL

(C.C.P. Secs. 1013(a), 2015.5)

I, the undersigned, say:

I am and was at the time of the within described mailing, over 18 years of age and employed in the County of Sonoma, California, in which the within referred mailing occurred. I am not a party to the cause or matter mentioned in the attached document.

My business address is 1022 Mendocino Avenue, Santa Rosa, California 95401.

I served the attached (full title of document)

STATEMENT ON APPEAL

by placing a copy thereof in an envelope or a copy of each in separate envelopes if more than one addressee is hereafter named, addressed to each addressee respectively at his office address, as follows:

Gene L. Tunney
District Attorney

County of Sonoma
2555 Mendocino Ave., Room 212J
Santa Rosa, California 95401

Each envelope so addressed and containing such copy was then sealed and postage thereon fully prepaid, and thereafter on the date and at the place this declaration was executed, shown below, deposited by me in a mail reception facility regularly maintained by the United States Postal Service.

Each copy of said document so served was accompanied by an unsigned copy of this proof of service made under declaration of perjury:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 11, 1981, at Santa Rosa, California.

/s/ L. Diane Goree

DIVISION FOUR
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA
APPELLATE DEPARTMENT

No. 209-C A016374

PEOPLE OF THE
STATE OF CALIFORNIA,

Plaintiff/Respondent

vs.

ALBERT WALTER TROMBETTA,

Defendant/Appellant

DECISION

(Filed January 20, 1982)

Appellant's principal contention is that failure of the breath testing device, the Intoxilyzer, to preserve a re-testable breath sample constitutes a denial of due process rendering the test results inadmissible. We conclude that this issue was decided in *People v. Miller* (1975) 52 Cal.App.3d 666, which held to the contrary. In so holding, the *Miller* court expressly rejected the contention that the duty to retain evidence once possessed, see *People v. Hitch*, 12 Cal.3d 641, should be extended to require that all evidence which can be reduced to preservable form by any means must be so transformed and retained. *Miller* 52 Cal.App.3d at 670.

We are aware that the record herein contains a number of factual matters which do not appear to have been involved in *Miller*. Specifically, it was stipulated that at the time of the collection of the breath sample on the Intoxilyzer, there was available to law enforcement authorities a device which has been approved by the Department of Health of the State for the collection of a breath sample for later testing, the Intoximeter Field Crimper-Indium Tube Encapsulation Kit; that that device is financially feasible for the State to use and is simple to operate, and that it can be used at any place or location, such as a police station or in the field. There is also evidence in the record to the effect that there is an exist-

ing, practical technique usable with the Intoxylizer for the preservation of breath samples, the "Silica Gel method," currently in use in the State of Colorado. Be that as it may, it remains our conclusion that we are bound by the holding of *Miller*.

Petitioner next contends that the requirement under Title 17 of the Administrative Code that blood and urine samples be preserved for retesting, but not breath samples, constitute a violation of equal protection in contravention of the United States and California Constitutions. It is axiomatic that unless a classification involves a suspect classification such as one based on race, or one which infringes on a fundamental interest such as right to vote or pursue a lawful occupation, it will be upheld if it bears a rational relationship to a legitimate state purpose. See *Weber v. City Council* (1973) 9 Cal.3d 950, 958-959. The classification involved here, assuming one exists, is clearly not suspect nor does it infringe on a fundamental interest. Therefore, the State need only show that it bears a rational relationship to a legitimate state purpose. The State has determined that given an opportunity to later test the accuracy of the Intoxylizer, and given the rigorous standards for maintenance and operation of the device, no sample need be preserved. Under the rational relationship test, the State's determination must be respected.

Lastly, appellant contends that failure to advise a defendant arrested for drunk driving that no breath sample will be preserved for retesting constitutes a denial of equal protection and/or due process. Since, under *People v. Branen* (1973) 32 Cal.App.3d 971, failure to admonish

a defendant of his choice of tests is not of constitutional proportion regarding exclusion of the results, we cannot say that failure to advise him that a particular test does not require preservation of the sample is of constitutional proportion.

The order denying motion to suppress is affirmed.
Dated: January 19, 1982

/s/ R. H. SIG,
Judge

WE CONCUR:

/s/ WILLIAM B. SOOSE
Judge

/s/ JOHN J. GOTHE,
Judge

DIVISION FOUR

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA

APPELLATE DEPARTMENT

No. 209-C A016358

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff/Respondent,
vs.

ALBERT WALTER TROMBETTA,
Defendant/Appellant.

ORDER DENYING REHEARING AND CERTIFYING
FOR TRANSFER TO COURT OF APPEAL

(Filed February 17, 1982)

The Petition for Rehearing is denied.

It is hereby certified that transfer of the herein case to the Court of Appeal appears necessary to settle an important question of law, namely, whether the holding in *People v. Miller* (1975) 532 Cal.App.3d 666, that failure to preserve a retestable breath sample does not render Intoxilyzer breath test results inadmissible, applies to a fact situation in which at the time of testing the breath sample on the Intoxilyzer, there was available to law enforcement authorities a device which would have preserved a breath sample for later testing, the Intoximeter Field Crimper-Indium Tube Encapsulation Kit, which had been approved by the Department of Health and stipulated to be financially and practicably feasible for the State to operate.

The Appellate Department of the Superior Court on January 20, 1982, affirmed an order of the Municipal Court denying defendant's motion to suppress. The basis of the Appellate Department's decision was that it was bound by the holding of *People v. Miller, supra*, and dicta contained therein.

Dated: February 16, 1982

/s/ RAY N. L.D.,
Judge of the Superior Court

/s/ WILLIAM B. BAER,
Judge of the Superior Court

/s/ JOHN W. GOTHE,
Judge of the Superior Court

COURT OF APPEAL OF THE STATE
OF CALIFORNIA
in and for the
FIRST APPELLATE DISTRICT
Division Four

No. A016358

Sonoma

Superior Court No. 209-C

(Filed March 24, 1982)

People of the State of California,

Plaintiff and Respondent,

vs.

Albert Walter Trombetta,

Defendant and Appellant.

BY THE COURT:

The Appellate Department of the Superior Court of the State of California in and for the County of Sonoma having certified that a transfer of the appeal in the above entitled action to the Court of Appeal appears necessary to secure uniformity of decision and to settle an important question of law, and good cause appearing therefore, the appeal from the Municipal Court in and for Sonoma County now pending in said superior court and numbered 209-C therein, is hereby transferred to the Court of Appeal, First Appellate District, Division Four.

The appeal will be calendared for oral argument when ordered on calendar.

/s/ Caldecott P.J.

Dated March 24, 1982

Thomas R. Kenney, Esq.
MURPHY, BROWNSCOMBE, KEEGAN & KENNY
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Santa Rosa, CA 95402
Telephone: (707) 545-5040
Attorneys for Defendant

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SONOMA

No. 77262

PEOPLE OF THE STATE OF CALIFORNIA,

vs.

MICHAEL GENE COX,
Defendant.

NOTICE OF MOTION AND MOTION TO SUPPRESS
EVIDENCE, FOR PROTECTIVE ORDER, POINTS
AND AUTHORITIES AND DECLARATION IN SUP-
PORT THEREOF

(Filed April 8, 1981)

Hearing date: 4/13/81
9:00 A.M., Dept. #3

TO GENE L. TUNNEY, District Attorney of Sonoma
County, State of California:

WHEREAS, the above entitled Court having hereto-
fore scheduled this cause on April 13, 1981 in Department
#3 of the above entitled court for hearing at 9:00 A.M. for
pretrial motions, you are hereby given notice that at said

time and place defendant will move pursuant to 1538.5 of the Penal Code and other applicable provisions of law for an order of this Court directing that the breath test results of defendant COX be suppressed as evidence against said defendant in any further proceedings herein, and that further, the Court issue a protective order preventing any reference to said test during the course of the trial; these motions are made on the grounds, *inter alia*, that:

1. The failure to provide the defendant with a testable sample of his breath is discriminatory and is a denial of due process of law in contravention of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7 and 13, of the California Constitution.

2. That the failure to advise defendant that there would be results of the test are suppressed. Defendants who choose the breath test or who are directed to take the same by the arresting officer, are not afforded the same opportunity as those who choose urine or blood.

At least a defendant should be informed of such discriminatory practice and given the opportunity to waive such discrepancy in the testing procedure.

II. NATION AND HITCH REQUIRE THE SUPPRESSION OF THE RESULTS OF THE BREATH TEST:

In *People vs. Hitch* (1974) 12 C 3d 641, the California Supreme Court held that where the test ampoule and reference ampoule and bubbler tube of a Breathalyzer test taken of the defendant in a case charging violation of Ve-

hicle Code Section 23102(a), were discarded, the result of the test would be excluded from evidence. ". . . unless the prosecution can show that the governmental agencies involved have established, enforced and attempted in good faith to adhere to rigorous and systematic procedures designed to preserve the test ampoule and its contents and the reference ampoule used in such chemical test. The prosecution shall bear the burden of demonstrating that such a duty to preserve the ampoules and their contents has been fulfilled." (At Page 652-653) (Emphasis supplied)

Hitch (supra) goes on to hold that a failure to meet that burden requires the results of the test to be excluded from evidence.

In the case at bar there was no effort, no intention to collect, or any attempt to collect breath samples of defendant for preservation for retesting, nor was there any effort to retain the simulator samples and/or solutions and compounds used to calibrate the subject Intoxilyzer machine used by the County of Sonoma on December 12, 1930, prior to testing this defendant on that same date. Also, no attempt or effort was made to advise defendant that no sample of his breath was being retained and thus as a result of these failures the spirit of *Hitch* (supra) has been violated and thereby dictates suppression of the test and its results.

The second of the landmark decisions by the California Supreme Court which compels suppression of the breath test results herein is *People vs. Nation* (1980) 26 C 3d 169, which made the following rulings and clarifications of *Hitch* (supra):

1. "Yet it is well established that the suppression by the State of evidence favorable to an accused after a request therefor, violates due process, irrespective of the good faith of the prosecution *Brady v. Maryland* (1963) 373 U.S. 83, 87, (10 L. Ed. 2d 215, 218, 83 S.Ct. 1194)." At page 175.

2. "In *People v. Hitch* (1974) 12 C 3d 641, 650; 117 C R 9, 527 P. 2d 361, we held that the obligation to disclose the existence of material evidence places on the state a correlative duty to preserve such evidence *even without a request therefor*, and directed that in the future law enforcement agencies take reasonable measures to ensure its adequate preservation." (Emphasis supplied)

Foot Note 1. "The present case is typical of the problem covered by *Hitch*, in that defendant here was not charged at the time the police physician obtained the semen sample. *If a request were a condition to the duty to preserve, the duty might not arise until it became impossible of performance.*" At page 175. (Emphasis supplied)

3. "As in *Hitch*, we are not in a position to examine the suppressed evidence to decide whether or not it is material. However, evidence lost to the destruction by the authorities *will be deemed material for the purpose of triggering the due process concerns of Hitch if there is a reasonable possibility that it would be favorable to the defendant on the issue of guilt or innocence.* (12 Cal. 3d at P. 649) Contrary to the prosecution's contention, the rationale of *Hitch* is thus not limited to circumstances in which the destroyed evidence proves a necessary element of the crime." At Page 176. (Emphasis supplied)

Nation (supra) imposes a *duty* to preserve any body fluid or body vapor, or other substance taken from a defendant, for retesting purposes, for the obvious reason that the preservation would admit of retesting by an ac-

cused defendant's own experts. The results of such retesting could be used to impeach the prosecution's witnesses and could possibly completely exonerate the defendant.

In the instant case the prosecution *took* the breath sample and although it *could have* inexpensively preserved a sample for retesting, it did not do so and the defendant was not informed that no sample would be preserved and the defendant thereby lost any opportunity to counter the devastating evidence of the results of the breath test which under the Vehicle Code would give rise to a presumption of guilt of the charge of 23102(a), if the result of the test is at or exceeds a reading of .10 percent by weight of alcohol in the person's blood. The results of the test in this case trigger the presumption of guilt. The result of the test herein was .20.

The failure to collect a sample of breath for retesting, makes it legally impossible for this defendant to *rebut* the presumption created by law that he was guilty. Yet, had defendant chosen a blood or urine test, the law *requires* the preservation of a sample for retesting. This is blatant discriminatory legislation on its face. There can be no reasonable or rational distinction between the blood, urine and breath tests, and why samples for retesting are required in two of the three tests available to a defendant, but not for the breath test.

The chemical analysis of any of the three tests gives rise to the same presumptions under Vehicle Code Section 23126 and therefore that which is fair as to two of the tests must apply to all.

As will be seen by the evidence to be presented on this motion, the state of the art, was at the time of defendant's

arrest, and had been for several years, that samples of a defendant's breath, taken at the time a blood alcohol breath test is given, *can be preserved and can be so preserved at a nominal cost.* In fact, the cost of taking breath samples for retesting is less costly than is required to preserve urine or blood samples for retesting.

In fact, in this very county, prior to the advent of the State crime lab concept, certain law enforcement agencies had followed the procedure of collection of samples of breath for submission for testing by a private contractor lab and for retesting at the defendant's behest.

III. THERE IS STATE APPROVED AND SCIENTIFICALLY ACCEPTED BREATH TESTING EQUIPMENT THAT CAN BE INEXPENSIVELY USED TO PRESERVE A BREATH SAMPLE FOR LATER RETESTING.

Section 1221.3(e) of the Regulations relating to Forensic Alcohol Analysis and Breath Alcohol Analysis, contained in Title 17 of the California Administrative Code provides that only such instruments as have been approved by the California State Department of Health Services shall be used for breath alcohol analysis in this State.

As early as 1973 the California State Department of Health Services approved a device known as an "Intoximeter Field Crimper—Indium Tube Encapsulation Kit". The device allows the collection of breath samples for breath alcohol analysis at a later time than the time of collection.

This device was, is, and has been available at a reasonable cost for several years. It is simple to operate and

would give a defendant the Constitutional right she or he may be entitled to, to wit: retesting.

There are other simple, inexpensive methods which would allow the taking of samples of a person's breath for later breath alcohol analysis which can be used in conjunction with the Intoxilyzer machine used by the County of Sonoma.

The evidence will amply illustrate that the samples collected by several available means can be tested at a subsequent time and that the results of the later tests are reliable.

IV. THE PROSECUTION IN SONOMA COUNTY HAS IN EFFECT "SUPPRESSED" MATERIAL EVIDENCE BY ITS FAILURE TO PRESERVE BREATH SAMPLES FOR LATER ANALYSIS.

It is axiomatic that sample of blood, breath, or urine, are material to the proof of drunk driving charges. As pointed out hereinabove certain presumptions arise at certain blood alcohol levels. (See Vehicle Code §23126). The test results, if admissible, trigger certain presumptions relating to guilt.

When one looks at simple analogies it becomes obvious that the failure to preserve breath samples is tantamount to suppression of evidence by law enforcement, which is, contrary to concepts of due process or as others have spoken of it, contrary to fair play.

Take the following three examples:

1. Let us suppose that a bullet is removed from a murder victim, analyzed by the governmental crime lab

for the purpose of connecting it up to the defendant's gun and then thrown away or destroyed before defendant can have it analyzed.

2. Suppose again that fingerprints found at a burglary scene are rolled and put on a card, analyzed and compared with defendant's, and after comparison the card is thrown away before the defendant has an opportunity to have them analyzed.

3. Suppose that a defendant is accused of murder by poison and the liquid is retrieved and analyzed and found by the prosecution to be poison and the substance is thrown away before allowing an analysis by the defendant.

In each of the above situations, one can readily say the defendant has been denied due process. *Hitch* (*supra*) and *Nation* (*supra*) tell us that there is something inherently unfair and wrong about the *non-preservation of material evidence*.

In the instant case, law enforcement has deliberately, consciously, and voluntarily chosen to make their own breath test on an Intoxilyzer, knowing that it does not preserve the breath sample taken and in spite of this knowledge has made no effort, although easy and inexpensive to do so, to preserve breath samples for retesting.

It is inherently wrong, unfair and unconstitutional to allow the prosecution to use the *results* of a test performed on *body* fluid or vapor to trigger certain presumptions of guilt without the most basic of safeguards, viz. the preservation of a sample of that fluid or vapor for

retesting by defendant to verify or refute the test results contended for by the prosecution.

The evidence will show in this case that the Intoxilyzer machine used by the prosecution to perform the breath test in this case is *far from foolproof*. It is woefully non-specific, i. e., reacts false positively to a number of substances which are not ethanol. The Intoxilyzer can also be inadvertently or advertently tampered with and can be improperly calibrated, all of which shortcomings are the fundamental and basic reasons why the test results on such a machine must be suppressed in the absence of a retestable preserved breath sample.

V. THE HONORABLE JOSEPH R. LONGACRE, JR., JUDGE OF THE MUNICIPAL COURT OF CONTRA COSTA COUNTY HAS RULED THAT THE FAILURE TO PROVIDE THE DEFENDANT WITH A SAMPLE OF HIS BREATH FOR PURPOSES OF RETESTING AS IS DONE IN THE CASE OF BLOOD AND URINE, DISCRIMINATES AND DENIES THE DEFENDANT A FAIR TRIAL PREVENTING HIM FROM ENJOYING THE DUE PROCESS OF LAW HE IS GUARANTEED.

Although this Court is not bound by another Municipal Court Judge's decision, it is submitted that Judge Longacre's decision is what *Hitch* (supra) and *Nation* (supra) are all about.

A complete copy of Judge Longacre's decision is marked Exhibit "A" and is attached hereto for the convenience of the Court and counsel. It is patently clear that Judge Longacre's analysis of the problem presented herein is a sound one and his decision should be followed.

VI. SISTER COUNTY MUNICIPAL COURT DECISION ON SIMILAR FACTS FAVORABLE TO THE DEFENDANT.

Defendant has heretofore requested that this Court take judicial notice of the decision of Judge Joseph R. Langacre Jr., Judge of the Municipal Court of the County of Contra Costa, in *People vs. Haslam*, Walnut Creek-Danville Judicial District case No. 29904-D.

Although the Court is not bound by this decision, the Court's reasoning and analysis of the application of *Hitch* (supra) and *Nation* (supra) might be helpful to the Court in this cause.

VII. COLORADO AND ARIZONA SUPREME COURTS APPLY PEOPLE V. HITCH (SUPRA) IN FACTUAL SITUATION SIMILAR TO THIS CAUSE.

In the case of *Garcia v. The District Court* (1979) 589 P. 2d 924 the Colorado Supreme Court had before it the precise question posed in the instant case. Colorado has a statutory scheme identical to that in California, in that the same chemical tests are available to a defendant; the identical presumptions apply given certain levels of alcohol in the blood as analyzed by blood, urine or breath tests and the regulations pertinent to chemical analysis provided for preservation of blood and urine samples for the defendant but did not provide for preservation of breath samples.

In *Garcia* (supra) as here no breath sample was preserved and the simulator samples were unavailable. There, as here, there was no requirement to retain breath samples

under Colorado State Board of Health Regulations, but there was such a requirement as to blood and urine.

The full text of the *Garcia* (*supra*) case is attached hereto marked Exhibit "B" and made a part hereof by reference.

Several holdings were made by the Colorado Court which it is respectfully submitted, apply to this case. They are as follows:

1. "Preservation of the blood, urine, or breath which formed the basis for the conclusion that a person was operating a vehicle while under the influence of intoxicating liquors is essential in view of the presumption that arises from the test." At Page 926;

2. ". . . procedures exist which permit the preservation of a Breathalyzer sample for use by the defense." At Page 926;

3. "The breath samples requested by the defendants are obviously material to the proof of the drunk driving charges." At Page 929;

4. "It is not necessary for a defendant to demonstrate that the evidence he seeks to discover, but which is no longer available for examination by the Court, would have been favorable to him. *People v. Harmes*, 38 Colo. App. 378, 560 P. 2d 470 (1976), so long as that evidence is not merely 'incidental' to the prosecution's case or to the defendant's affirmative defense. *People v. Bynum*, 192 Colo. 60, 556 P. 2d 469 (1976). It is sufficient that the material requested 'might' be 'favorable to the accused.' *United States v. Bryant*, 142 U.S. App. D.C. 132, 142 N. 21, 439 F. 2d 642, 652 N. 21 (D.C. Cir. 1971)." At Page 929;

5. "The failure of the State to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by State agents, is *tantamount to suppression of that evidence*. It is incumbent upon the State to employ regular procedures to preserve evidence which a State agent, in the regular performance of his duties, could reasonably foresee 'might be' 'favorable' to the accused." At Pages 929-930. (Emphasis supplied)

Basically, *Garcia* (supra) holds as does *Hitch* (supra) and *Nation* (supra).

In California, (like Colorado), *Vehicle Code Section 23126* imposes certain presumptions based upon chemical analysis of blood or urine or breath. *Absolutely no distinction is made as to the presumption which comes into play based upon the type of test taken by a defendant.*

California Vehicle Code Section 13353 gives the person arrested the absolute right to have a blood, breath or urine test and he is required to be advised of his choice by law enforcement.

The refusal to submit to a test results in a suspension of one's driver's license for a period of 6 months.

The very language of California Vehicle Code Section 13354 allows the person submitting to one of the three tests to have a retest. The obvious intent of the legislature is to have a sample available for retest, otherwise there can be no retest and the statute would be meaningless.

There can be no freedom of choice unless the defendant is informed that if he chooses the breath test, no

sample will be preserved. He must be given the right to choose any of the tests that will preserve to him the right to retest. Otherwise, he has not given an informed consent nor has he had a free choice knowing all the facts, and in such case the results of the test must be suppressed in fairness. It can be properly argued that an unreasonable search and seizure has been made of defendant's person and body vapor when he was not properly informed and advised by law enforcement.

Title 17, Sections 1219 through 1219.3 only require blood and urine samples to be maintained for analysis by the defendant. Thus, a defendant choosing a breath test is denied equal protection for no rational reason.

Perhaps, at the time the Administrative Code Regulations were adopted, there was no approved method of collecting breath samples. Such has not however been the case since 1973 as pointed out at an earlier point in this memorandum.

An Arizona Supreme Court decision, *Baca v. Smith*, 1979, 124 Ariz. 353, holds similarly to *Garcia* (supra), and the test is attached and marked Exhibit "C".

VIII. DISCRIMINATORY STATE LEGISLATIVE ACTION REQUIRING PRESERVATION OF BLOOD AND URINE SAMPLES AND NOT BREATH IS A DENIAL OF EQUAL PROTECTION.

In *Reed v. Reed* (1971) 404 U.S. 71, 92 S. Ct. 251, our United States Supreme Court said:

"The Equal Protection clause . . . (denies) to states the power to legislate that different treatment

be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'" quoted in *Brown v. Merlo* (1973) 8 C. 3d 855, 861.

In applying *Reed* (*supra*) to the instant case, it is obvious that one group of individuals who choose a breath test as opposed to a blood or urine test, are given a different treatment as to their right to a body sample for retesting even though the body sample in question, (breath) is just as vital to the case as blood or urine samples and in spite of the fact that the breath can be *easily* and *inexpensively* preserved for retesting.

It is difficult to conceive how any sound thinking person can argue against the fact that a defendant taking a breath test is denied equal protection where no sample is preserved.

It is neither reasonable nor consistent for law enforcement to ignore the fact that science has had an approved, reasonable, simple, inexpensive way to preserve breath samples for retesting, at least since 1973. Law enforcement cannot be allowed to defend their laxity in preserving breath samples on the basis that Title 17 "doesn't require it".

Vehicle Code Section 13354(c) which provides that:

"Upon the request of the person tested full information concerning the test taken at the direction of the peace officer shall be made available to him or his attorney",

can be read to override Title 17.

This section certainly can be read to intend that "full" information including breath samples be made available to a defendant. Otherwise, the section has little or no meaning.

IX. PEOPLE V. MILLER IS INAPPLICABLE TO THE ISSUES IN THIS CASE BY ITS OWN LANGUAGE.

The prosecution will undoubtedly argue that *People v. Miller* (1975) 52 Cal. App. 3d 666, upholds the use of the Intoxilyzer machine notwithstanding that it does not collect breath samples for retesting.

It must be pointed out to the Court that *Miller* (*supra*) by the very language in the decision, does not reach the issues of this case and of course, does not and cannot overrule *Hitch* (*supra*).

In *Miller* (*supra*) the Court said at Page 670:

"In view of our determination of the basic issue, we do not elucidate the obvious point that *Hitch*, by its express terms, applies only to tests of breath administered after its filing, October 21, 1974. All the tests in the three cases before us were conducted before that date."

X. THE CONSEQUENCES OF A CONVICTION OF DRUNK DRIVING ARE EXTREMELY SERIOUS.

Drunk driving is a major misdemeanor. The consequences of conviction are potentially horrendous. In addition to fines, jail sentences may be imposed as can driver's license suspensions. Second convictions within five years require at least 48 hours jail time and could result in a 1 year jail term, and up to \$1,000.00 in fines and a mandatory 1 year license suspension. Greater consequences flow from additional convictions.

Additional consequences flow from a drunk driving conviction, such as higher insurance premiums and difficulty in obtaining insurance.

As Judge Longacre stated in his opinion:

"This Court wants it understood that it is not condoning leniency to the drunk driver, but it is insisting that every accused drunk driver who is being exposed to the *drastic consequences of a conviction* be afforded reasonable opportunity to employ a non-discriminatory defense in his behalf. As Justice Mosk indicated in the *Nation* decision, the integrity of our entire judicial system is dramatically involved." (Emphasis supplied)

This is not a case wherein the Court is being asked to dismiss the case at this time. The prosecution may proceed with their case sans the test results if it chooses to do so.

This is a case where the Court must suppress the evidence based on constitutional standards which invoke fair play. This is not a case which admits of technical or fine distinctions. It is clear under the law that the test results must be suppressed.

Dated: 3/31/81

Respectfully submitted,

Murphy, Brownscombe, Keegan
& Kenney

By: /s/ Thomas R. Kenney

Attorneys for Defendant.

(Captioned Omitted)

No. 77262

POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO SUPPRESS AND MOTION
FOR PROTECTIVE ORDER

(Filed October 16, 1981)

I. *Background Information:*

The above named defendant was arrested on or about December 12, 1980, by the California Highway Patrol, and chose the breath test after having been encouraged to do so by the arresting officers. Defendant anticipates that it will not be disputed at the time of the hearing of this motion that every arresting agency in the Sonoma County area utilizes one Intoxilyzer breath machine located at the Sonoma County Jail when a suspected 23102a arrestee chooses a breath test pursuant to §13353 of the California Vehicle Code; that officers do not inform these defendants that this choice of the three tests will not afford the defendant an opportunity for later testing; that no breath samples of the defendant are preserved for later testing, and that the simulator samples and solutions and compounds used to calibrate this machine are not preserved for later retesting by the defendant.

Defendant maintains, in substance, that the failure of a law enforcement agency to preserve a breath sample for his own retesting is discriminatory, denies equal protection and due process of law to an accused, and denies a fair trial unless the no breath sample preserved as evidence and/or for retesting is discriminatory and is a denial of due process of law in contravention of the Fourth, Fifth and Fourteenth Amendments to the United States

Constitution and Article I, Sections 7 and 13, of the California Constitution.

3. That the failure to preserve the simulator samples and solutions and compounds used to calibrate the Intoxilyzer machine used by the County of Sonoma on December 12, 1980, before the defendant was administered the test, is discriminatory, and is a denial of due process of law in contravention of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7 and 13 of the California Constitution.

4. That the failure of the arresting officers and/or the State Criminalistic Lab, Department of Justice, to at least inform (orally or in writing) suspected intoxicated drivers who choose a breath test that this is the only test of the three available pursuant to Vehicle Code Section 13353 that does not afford them the opportunity of a later retesting of the sample is a denial of due process of law in contravention of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7 and 13 of the California Constitution.

This motion is based on this notice, the pleadings, records and files in this action, the attached memorandum of points and authorities, the supporting declaration of defendant and such other oral and/or written evidence and declarations as may hereinafter be offered at the time of the hearing of this motion.

Dated: March 8, 1981.

Murphy, Browncombe, Keegan &
Kenney

By: /s/ Thomas R. Kenney
Attorney for Defendant

No. 77262

(Caption Omitted)

DECLARATION OF DEFENDANT MICHAEL
GENE COX IN SUPPORT OF MOTION
TO SUPPRESS, ETC.

(Filed April 9, 1981)

I, MICHAEL GENE COX, declare:

1. I am the defendant in the above entitled proceeding;
2. On or about December 12, 1980, I resided at 2138 Westwood Drive, Santa Rosa, California.
3. On December 12, 1980, I was arrested by an officer of the California Highway Patrol for an alleged violation of California Code Section 23102(a).
4. On or about said date of my arrest, I was taken to the Sonoma County Jail and administered a breath test on an Intoxilyzer machine. No other type of chemical test was administered to me on this date, by the arresting officers or any other law enforcement agency.
5. The arresting officers read me an admonition of my rights under 13353 of the California Vehicle Code and then suggested that I take the breath test to determine the alcoholic content in my system.
6. At no time did any of the arresting officers or any other law enforcement representative advise me that there would be no sample of my breath preserved for later analysis or comparison analysis.

7. At no time did any of the arresting officers or any other law enforcement officer indicate to me that in the blood and urine tests, samples were available to an arrested individual for later analysis, differentiating these from the breath test.

8. At no time did the arresting officer or any other law enforcement official advise me that no means had been provided by the County of Sonoma, State of California, or any of its law enforcement agencies in this county for the preservation of a sample of breath.

9. I would not have submitted to the breath test of the intoxilyzer machine had I been informed that no sample of my breath would be retained or preserved for later retesting.

10. Had I been so informed, I would have chosen one of the other two tests, urine or blood, thus affording me an opportunity for my own retesting by an expert of my choice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 8, 1981, at Santa Rosa, California.

/s/ Michael Gene Cox

No. 77262

(Caption Omitted)

**DECLARATION OF DEFENDANT MICHAEL
GENE COX IN SUPPORT OF MOTION
TO SUPPRESS, ETC.**

(Filed May 19, 1981)

I, MICHAEL GENE COX, declare:

1. I am the defendant in the above entitled proceeding.
2. On or about December 12, 1980, I resided at 2138 Westwood Drive, Santa Rosa, California.
3. On December 12, 1980, I was arrested by an officer of the California Highway Patrol for an alleged violation of California Vehicle Code Section 23102(a).
4. On or about said date of my arrest, I was taken to the Sonoma County Jail and administered a breath test on an Intoxilyzer machine. No other type of chemical test was administered to me on this date, by the arresting officers or any other law enforcement agency.
5. The arresting officers read me an admonition of my rights under 13353 of the California Vehicle Code and then suggested that I take the breath test to determine the aleoholic content in my system.
6. At no time did any of the arresting officers or any other law enforcement representative advise me that there would be no sample of my breath preserved for later analysis or comparison analysis.
7. At no time did any of the arresting officers or any other law enforcement officer indicate to me that in the blood and urine tests, samples were available to an arrested individual for later analysis, differentiating these from the breath test.

8. At no time did the arresting officer or any other law enforcement official advise me that no means had been provided by the County of Sonoma, State of California, or any of its law enforcement agencies in this county for the preservation of a sample of breath.

9. I would not have submitted to the breath test on the intoxilyzer machine had I been informed that no sample of my breath would be retained or preserved for later re-testing.

10. Had I been so informed, I would have chosen one of the other two tests, urine or blood, thus affording me an opportunity for my own retesting by an expert of my choice..

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 15, 1981, at Santa Rosa, California.

/s/ Michael Gene Cox

No. 77262 TCR

(Caption Omitted)

**SUPPLEMENTAL POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S MOTION
TO SUPPRESS EVIDENCE**

(Filed June 25, 1981)

[These points and authorities should be considered together with those previously filed with the court by the defendant.]

Title 17, California Administrative Code, provides, as is stated in points and authorities submitted by the People

in opposition to defendant's motion, for the procedures to be followed in Forensic Alcohol Analysis.

Title 17 §1219 is as follows:

"*Samples* taken for forensic alcohol analysis and breath alcohol analysis *shall be collected* and handled in a manner approved by the Department. The identity and integrity of the samples shall be maintained through collection to analysis and reporting." (Emphasis added)

Title 17 §1221. Setting out the procedures for analysis of breath alcohol. §1221(e) indicates that breath alcohol analysis can only be performed on samples which are either (a) "collected with a sample capturing instrument designed for entrapment of a breath sample", and (b) a capturing instrument designed "for entrapment of a breath sample for later analysis". In either situation for the instrument to be approved for breath alcohol analysis under Title 17, a distinct sample of breath must be collected. The detailed conditions under which the breath sample must be taken are set out in §1219.3 as follows:

"A breath sample shall be expired breath which is essentially alveolar in composition. The quantity of the breath sample shall be established by *direct volumetric measurement*. The breath sample shall be collected only after the subject has been under continuous observation for at least fifteen minutes prior to collection of the breath sample, during which time the subject must not have ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked." (Emphasis added)

Since the quantity of the breath taken as the sample must be determined by its *volume*, it must, of necessity, be captured in an enclosed container. Thus, a container in the apparatus must be filled to capacity in order to prop-

erly conduct the test in accordance with §1221.1. This sample collected by authorities, in a container suitable to testing, under their control and capable of yielding the only scientific evidence available of defendant's state of intoxication and capable of triggering a presumption of that intoxication, is destroyed by the willful act of purging the container with air.

In the People's points and authorities at P. 2, L. 25, etc., they contend that the People have no duty to collect evidence but merely to preserve evidence in the state's possession. This is all that the defendant requires. The state did have a sample of his breath but failed to preserve it as required by *People v. Hitch* (1974) 12 C 3d 641 and *People v. Nation* (1980) 26 C 3d 169.

The People at P. 9, L. 19, etc., of their motion indicate that the intoxilyzer used by them is incapable of *collecting* a sample (which, of course, would make the machine ineligible for use under Title 17 §1219 and §1221(c), and that the act of testing destroys the sample. They cite *State v. Young* (1980) 614 P 2d at 446; however, *Young* does *not* deal with the tests performed by an intoxilyzer of the type in the case before the court. In *Young* testing was done by gas chromatography which, of necessity, destroys the sample. At P.1 of the People's motion they state that the test is performed by measuring the relative absorption of infrared energy which would have no chemical effect on the integrity of the sample. At P. 2 they admit that the sample is lost through a purging of the sample container with air. Thus, the sample of defendant's breath was not destroyed by the testing but by a purposeful act of the operator of the machine after he had made his tests. Thus, the numerous cases cited by the

People in support of the proposition that a defendant is not denied due process when evidence is lost in the course of scientific analysis, have no relevance in the case before the court. Here the sample was collected by the authorities, tested by them but not altered by that test, and then, when the authorities had obtained results satisfactory to them, was destroyed by their acts.

Under *Hitch* (*supra*) the court in a case such as this must make a three-pronged inquiry: (1) was the evidence at issue material to the case; (2) was it destroyed by the investigative agency and (3) assuming affirmative answers to these two questions, have the People proved that rigorous and systematic procedures designed to preserve such evidence were being enforced at the time the evidence was destroyed? It is clear that the first two questions must be answered in the affirmative. In regards to the third, the People have not even claimed that they attempted to preserve the sample. They just deny that any sample was collected and if the court finds this to be true, it must also find that the method of collecting and testing defendant's breath did not comply with the requirements of Title 17 and thus must suppress the evidence. Alternatively, they claim that it is either too costly or unpractical or impossible to preserve the sample that they tested. They certainly have not proved (nor even claimed) that they have any procedures designed to preserve the evidence. Thus, the People having failed to comply with the teaching of *Hitch*, the evidence must be suppressed.

CONCLUSION

In light of the above arguments and those presented previously in defendant's motion to suppress evidence, it

is respectfully urged that the defendant's motion be granted and the results of the breath alcohol test administered to the defendant be suppressed.

Respectfully submitted,
Murphy, Brownscombe, Keegan &
Kenny
By: /s/ Thomas R. Kenney
Attorneys for Defendant.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA

No. 77262

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff/Respondent,

vs.

MICHAEL GENE COX

Defendant/Appellant.

PROPOSED SETTLED STATEMENT
OF FACTS

(Filed August 31, 1981)

INTRODUCTION

The defendant appeals from an order of the Municipal Court entitled on July 3, 1981 denying his Motion to Suppress Evidence. A Notice of Appeal was filed with this court on July 30, 1981 (Exhibit A) together with a Stipu-

lation consolidating five other cases which had been heard together with this case by the Municipal Court. (Exhibit B)

STATEMENT OF FACTS

The defendant (and each of the defendants' noted in Exhibit B) was arrested for driving under the influence of alcohol, in the County of Sonoma, was transported to Sonoma County Jail and there tested with a blood-alcohol device known as an Omicron Intoxalizer.

Pursuant to a Stipulation entered into a hearing of the motion to suppress on this case it was agreed as follows:

"2. That the defendant and the People by their respective counsel agree that all points and authorities, testimony, findings and the decision by the law and motion judge in People v. Bertram, action #78402 TCR, shall be binding on the People and the defendant in this cause as if the testimony, points and authorities, etc., had been given in this cause."

Respectfully submitted,

/s/ Thomas Kenney

/s/ William D. A. Wallace

Attorneys for Defendant

No. 77262

(Captioned Omitted)

NOTICE OF APPEAL

(Filed July 20, 1981)

(Filed October 16, 1981)

Defendant MICHAEL GENE FOX hereby appeals from an order of the Municipal Court entered on July 10, 1981 denying his Motion to Suppress Evidence.

DATED: July 27, 1981

/s/ Thomas Kenney

/s/ William D. A. Wallace

Attorneys for Defendant

(Caption Omitted)

No. 77262

STIPULATION AND ORDER

(Filed October 16, 1981)

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties that for purposes of appeal the following cases should be consolidated with this case:

People v. Herbert Berreyesa	79839
People v. Patricia J. Keeffe	78305
People v. Thomas Muldoon	79044
People v. Kensel L. Furner	78206
People v. Clinton James Brown Jr.	79846
People v. Michael Gene Cox	77262

Date: 7-30-81 /s/ illegible
 Deputy District Attorney

Date: 7-30-81 /s/ Thomas Kenney

Date: 7-30-81 /s/ William D. A. Wallace

ORDER

Pursuant to the stipulation of counsel, IT IS ORDERED that the cases be consolidated as setforth herein.

(SEAL)

/s/ illegible
Judge

(Caption Omitted)

No. 77262

DECLARATION OF JERRY W. CURRY

(Filed October 16, 1981)

I, JERRY W. CURRY, declare as follows:

1. My name is JERRY W. CURRY and my business address is 1041 4th Street, Santa Rosa, California;
2. I have a B.A. degree from San Jose State University in Medical Technology, Chemistry and Microbiology. My year of graduation from San Jose State University was 1961;
3. I am a Forensic Alcohol Supervisor duly qualified as such by the State of California to perform Forensic

Alcohol Analysis. I have been so qualified since December 21, 1970.

4. I have been associated with Central Pathology Laboratory, whose present address is 1041 4th Street, Santa Rosa, California, since June 1, 1969.

5. I am an officer, stockholder, and a member of the Board of Directors of Central Pathology Laboratory, a California corporation engaged in the science of, among other scientific studies, forensic alcohol analysis from human blood, urine and breath.

6. I am the lab manager of Central Pathology Laboratory.

7. I have personally performed forensic alcohol analysis in conjunction with my association with Central Pathology Laboratory, on human samples of blood, urine, and breath and have personally tested and analyzed well over 1,000 samples of blood, well over 1,000 samples of urine and well over 1,000 samples of breath from different humans for alcohol analysis.

8. From approximately 1970 to some date in 1975, Central Pathology Laboratory performed blood, urine and breath alcohol analysis on behalf of the District Attorney's office of the County of Sonoma in conjunction with said District Attorney's criminal law enforcement duties, which analyses were primarily involved with individuals suspected of driving motor vehicles while under the influence of alcoholic beverages in violation of the laws of the State of California.

9. From 1972 to a date in 1975, law enforcement agencies in Sonoma County, such as the Sheriff's Office, Cali-

fornia Highway Patrol and various City Police groups, used a scientific instrument known as an "Intoximeter Field Crimper-Indium Tube Encapsulation Kit" for the purpose of collecting breath samples in the field, of persons suspected of driving a vehicle under the influence of intoxicating beverages, where those persons requested a breath test. Various police stations throughout Sonoma County also had these instruments on hand at their various stations for collection of breath samples. The above described Intoximeter Field Crimper is designed as a capturing device for entrapment of alcohol in a breath sample for later analysis.

It is capable of being used in a stationery location or in a vehicle and the device operates by plugging it into a 110 volts receptacle or a cigarette lighter receptacle in a motor vehicle. The device and accompanying kit is simple to use and requires very little room to house same. No scientific background or knowledge is required to operate the device or capture breath samples.

10. The "Intoximeter Field Crimper—Indium Tube Encapsulation Kit" has been approved for use in California for use in breath alcohol analysis since August 8, 1973.

11. The Intoximeter Field Crimper referred to in this declaration and as is approved by the State of California, is designed to collect 3 samples of breath, *each of which may be separately analyzed at a time later than the moment of collection thereof.*

12. Between 1972 and a date in 1975, law enforcement personnel in Sonoma County who had collected breath

samples with the Intoximeter Field Crimper would submit three samples of breath from each suspect in Indium Tubes to Central Pathology Laboratory. The laboratory would in turn routinely analyze two of the three samples and retain the third sample intact for retesting by the suspect, should a request for same be made by the suspect.

13. At all times mentioned herein, including the present date, Central Pathology Laboratory owned and utilized a "Gas Chromatograph Intoximeter Mark II". This instrument was approved by the State of California for Breath Alcohol Analysis in 1971 and to this day said instrument continues to be so approved. This instrument allows the *immediate* analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed and it also permits later analysis of breath samples which are collected with an Intoximeter Field Crimper—Indium Tube Encapsulation Kit. Both methods of breath alcohol analysis, i.e. the immediate analysis by direct expiration into the instrument and the *later analysis* from collected samples have been authorized in California for several years.

14. To my personal knowledge, breath alcohol analysis results from collected samples of breath using the aforesaid Intoximeter Field Crimper, have been admissible in Court as evidence in cases involving persons suspected of driving motor vehicles while under the influence of intoxicating liquor.

15. To my knowledge, the aforesaid Intoximeter Field Crimper—Indium Tube Encapsulation Kits are and have been readily available for purchase and use.

16. The Gas Chromatograph Intoximeter Mark II instrument is available for use in the Central Pathology Laboratory at this time and will continue to be available for use in conducting breath alcohol analysis on a scientifically reliable basis.

17. It is my considered opinion that breath samples which are properly collected with the Intoximeter Field Crimper—Indium Tube Encapsulation Kit may be readily and accurately tested and analyzed for alcohol content. Tests and experiments I have personally performed have indicated that a retained breath sample in an indium tube may be scientifically and reliably tested for up to 3 months after the collection of the breath sample.

18. An approved method of collecting breath samples for later analysis for alcohol content has existed since August of 1973. It is my opinion that law enforcement personnel in Sonoma County have had the capability of capturing and retaining said breath samples for the past several years had they desired to do so. The Intoximeter Field Crimper—Indium Tube Encapsulation Kit may be used separate and apart from any other instrument for the breath collection process and does not depend upon any other instrument for the collection of the breath sample.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 18, 1981, at Santa Rosa, California.

/s/ Jerry W. Curry

DIVISION FOUR
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA
APPELLATE DEPARTMENT

No. 215-C A016374

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent

vs.

MICHAEL GENE COX, et al.,

Defendants/Appellants

DECISION

(Filed January 20, 1982)

The issues herein are identical with those involved in the matter of *People v. Albert Walter Trombetta*, No. 209-C, decided this day. We attach a copy of our decision in that matter hereto and incorporate its reasoning by reference.

The order denying defendants' motion to suppress is affirmed.

Dated: January 19, 1982

/s/ illegible

Judge

WE CONCUR:

/s/ WILLIAM B. BOONE,

/s/ JOHN J. GOTHES,

Judge

DIVISION FOUR

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Attorneys for Appellants

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA

APPELLATE DEPARTMENT

No. 215-C A016374

PETITION FOR REHEARING AND
APPLICATION FOR CERTIFICATE

(Filed February 9, 1982)

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

vs.

MICHAEL GENE COX, THOMAS NELSON,
MULDOON, CLINTON JAMES BROWN,

KENSEL LEE FURNER, PATRICIA JANE
KEEFFE, HERBERT JOHN BERREYESSA,
and JAMES K. SCHNEIDER,

Defendants/Appellants.

TO: THE APPELLATE DEPARTMENT OF THE
ABOVE ENTITLED COURT.

Pursuant to Rules of Court, 107, defendants and appellants (hereinafter appellants) herewith petition for a rehearing or in the alternative for an order directing that this matter be certified for transfer to the District Court of Appeal pursuant to Rules of Court 62 and 63(a).

BASIS FOR REHEARING

I

PEOPLE V. MILLER IS NOT CONTROLLING

In *Miller*, (1975) 52 C A 3d 666 the Court stated in its own language that its holding was dicta. (See page 670 of the opinion.)

In addition, the *Miller* court did not address itself to the equal protection issue. On page 668 of the *Miller* decision they impliedly demonstrate that they were either unaware that the field crimper was available or didn't consider such a fact if they knew it was available.

II

**EQUAL PROTECTION REQUIRES EQUALITY
UNDER THE SAME CONDITIONS**

The preservataion of blood and urine samples is mandated by applicable Administrative Code regulations, yet breath collection is not so mandated. This alone is a clear violation of the equal protection provisions of the state and federal constitutions.

Garcia v. the District Court (1979) 589 P. 2d 924; *People v. Nation* (1980) 263 C 3d 169; and *People v. Hitch* (1974) 12 C 3d 641 all direct that law enforcement must make preservable evidence available to a defendant or suffer the consequences (suppression of the tests or evidence). Thus, destructive testing is prohibited.

III

THESE CONSOLIDATED CASES SHOULD BE CERTIFIED TO THE DISTRICT COURT OF APPEAL

There are hundreds of pending 23102(a) prosecutions in this jurisdiction, and several other motions similar to appellants' motion either before the Municipal Court or under submission in the 1982 Appellate Division of this Superior Court.

Under 63(A) important and far reaching questions of law are involved, hence, under Rule 62(a) and 63(a) this matter should be certified.

Enhanced penalties under the new 23152 CVC rules further emphasize this need. In addition, the distinctions set forth in *Miller* (*supra*) and the holdings of sister state Supreme Courts (*Garcia*, *supra*) give this Court a further basis for certification.

WHEREFORE, appellants request either a rehearing or certification to the District Court of Appeal.

Dated: February 9, 1982.

Respectfully submitted,

MURPHY, BROWNSCOMBE, KEEGAN,
KENNEY & BARBOSE

/s/ THOMAS R. KENNEY,

Attorneys for Appellants.

DIVISION FOUR
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA

APPELLATE DEPARTMENT

No. 215-C

(Stamped A016374)

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff/Respondent,
vs.

MICHAEL GENE COX, et al.,

Defendant/Appellant.

ORDER DENYING REHEARING AND
CERTIFYING FOR TRANSFER
TO COURT OF APPEAL

(Filed February 25, 1982)

The Petition for Rehearing is denied.

It is hereby certified that transfer of the herein case to the Court of Appeal appears necessary to settle an im-

portant question of law, namely, whether the holding in *People v. Miller* (1975) 52 Cal.App.3d 666, that failure to preserve a retestable breath sample does not render Intoxilyzer breath test results inadmissible, applies to a fact situation in which at the time of testing the breath sample on the Intoxilyzer, there was available to law enforcement authorities a device which would have preserved a breath sample for later testing, the Intoximeter Field Crimper-Indium Tube Encapsulation Kit, which had been approved by the Department of Health and stipulated to be financially and practicably feasible for the State to operate.

The Appellate Department of the Superior Court on January 20, 1982, affirmed an order of the Municipal Court denying defendant's motion to suppress. The basis of the Appellate Department's decision was that it was bound by the holding of *People v. Miller*, *supra*, and dicta contained therein.

Dated: February 24, 1982.

/s/ illegible,
Judge of the Superior Court

/s/ William B. Boone
Judge of the Superior Court

/s/ John J. Goethe
Judge of the Superior Court

J. FRED HALEY
Attorney at Law
One Kaiser Plaza
Oakland, California 94612

834-9977

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF CONTRA COSTA

Walnut Creek-Danville Judicial District

No. 31381

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff
vs

GREGORY MOLLER WARD,
Defendant

NOTICE OF MOTION AND MOTION FOR
PRE-TRIAL DISCOVERY, ALTERNATIVE
MOTION TO EXCLUDE RESULTS OF
INTOXILYZER TEST

(Filed February 26, 1982)

TO WILLIAM A. O'MALLEY, DISTRICT ATTORNEY
OF CONTRA COSTA COUNTY, AND TO THE ABOVE
ENTITLED COURT:

PLEASE TAKE NOTICE that on February 26, 1981,
at 9:30 a.m., or as soon thereafter as the matter may be
heard, defendant's counsel will move the above entitled
Court for an order from said Court directing the District
Attorney to make available to defendant's attorney for
examination, copying or testing any and all of the follow-
ing information, documents or other things in the pos-

session of said District Attorney or any of his employees, agents, officers or deputies.

1. All notes, memoranda, whether handwritten or typed, made by police officers or other investigating officers pertaining to their conversations with the defendant on or about July 6, 1980 (other than the written police report which is already in the possession of defendant's counsel).

2. Records of the maintenance of the intoxilyzer machine through which defendant's breath sample was tested, which records shall be limited to thirty days before and after July 6, 1980 (17 Cal. Admin. Code, Section 1222.2).

3. Copies of permanent record or log book pertaining to calibration records for the intoxilyzer which was used to test defendant's breath sample, said records being limited to the period of thirty days before and after July 6, 1980 (17 Cal. Admin. Code, Section 1222.2).

4. Copies of records of analysis of quality control samples provided by a forensic alcohol laboratory for the period of ten days before and after July 6, 1980, and the name and qualifications of the operator who performed the analysis of reference samples on the intoxilyzer which tested defendant's breath sample (17 Cal. Admin. Code, Section 1221.4(a)(2)(A)).

5. If no quality control samples were analyzed within ten days prior to July 6, 1980, then copies of records and the dates of the first quality control samples analyzed prior to July 6, 1980, and the records of the testing of unknown samples thereafter up to and including twenty-five samples (17 Cal. Admin. Code, Section 1221.4(a)(2)(C)).

6. Copies of any and all records of controlled experiments performed on the intoxilyzer which tested the defendant's breath sample showing the correlation between the subject's breath sample and the blood sample taken at the same time (17 Cal. Admin. Code, Section 1221.2(a) (4)).

7. A sample of defendant Gregory Moller Ward's breath which was taken on July 6, 1980.

Defendant attaches hereto and incorporates herein as Exhibit A the declaration under penalty of perjury of Kenneth Dean Parker, toxicologist, of Hine Incorporated in support of, and as an extension of, this motion.

IN THE ALTERNATIVE, under the assumption that the California Highway Patrol did not preserve and retain a sample of defendant's breath which was subjected to testing by the Walnut Creek Police Department's intoxilyzer, defendant's counsel herein will move the above entitled Court to grant said counsel's motion to exclude the results of the intoxilyzer test in the above entitled matter. Said motions will be made and based upon the attached points and authorities, the declaration of Kenneth Dean Parker attached hereto as Exhibit A, the declaration of defendant Gregory Moller Ward, and upon such other oral and documentary evidence as may be presented at the hearing of this motion.

Dated: February 5, 1981.

J. FRED HALEY
Attorney for Defendant

**POINTS AND AUTHORITIES RE MOTION
FOR DISCOVERY**

Under criminal pre-trial discovery procedure, it has been generally held that the defendant can compel the

prosecution to permit inspection and copying of all evidence which can throw light on the issues of the case absent some governmental requirement that information be kept confidential for the purpose of law enforcement. *Vance v. Superior Court*, 51 C. 2d 92, 330 P. 2d 733.

The state's obligation is not necessarily to convict, but to see that so far as possible the truth of a case emerges. No respectable interest of the state is served by concealing information which is material to the case. *People v. Riser*, 47 C. 2d 566, 305 P. 2d 1.

The accused has the right, before trial, to examine original notes made by officers concerning his oral statements and further to inspect and copy any written statements prepared from those notes. *Funk v. Superior Court*, 52 C. 2d 423 at 424, 340 P. 2d 593 (1959).

Records of the maintenance, calibration and analysis of quality control samples with respect to the intoxilyzer machine which tested defendant's breath sample are clearly relevant and material to this action inasmuch as the results from that intoxilyzer machine are the most critical evidence in this case. A fortiori production of the preserved sample of defendant's breath is necessary in order to enable defendant to test the reliability and precision of the intoxilyzer's results.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO EXCLUDE RESULTS OF INTOXILYZER TEST

On July 6, 1980, the defendant Gregory Moller Ward was stopped by Officer R. K. English, Jr. of the California Highway Patrol, I.D. No. 8218, on suspicion of driving under the influence of alcohol. The defendant was

given a breath test by use of an intoxilyzer which produced a reading of .17 and .18.

This intoxilyzer, unlike other devices in use for testing the alcoholic content of a suspect's breath, had no ampul which can be removed and preserved for later retesting. In the past, county law enforcement agencies utilized the services of an institution known as Ultra Chem Corporation in testing breath samples. That corporation's intoxilyzer had the ability to preserve such breath samples and every defendant who chose this particular test was given a written statement informing him that he was entitled to have the sample of his breath saved for purposes of such retesting. Ever since the county law enforcement agencies have taken over the operation of the intoxilyzer aspects of blood alcohol measurement, there is no longer any method by which a breath sample is or can be preserved.

It is significant to note that the alleged "drunk driver" is not informed by the law enforcement authorities that no sample of his breath will be retained for later testing verification by a toxicologist of the alleged "drunk driver's" selection; whereas if he or she takes a blood or urine test, such a sample will be retained. In most cases, and in this case, the alleged "drunk driver" is encouraged and persuaded by the law enforcement authorities to take the breath test. One explanation of such encouragement and/or persuasion is that said law enforcement authorities realize that with the breath test there can be no verification. Like Ceaser's wife, these law enforcement authorities should be "above suspicion" on this critical subject.

Because the Walnut Creek Police Department's intoxilyzer has no capability for preserving any sample of

defendant's breath, no independent analysis of the defendant's breath could or can be made to determine whether or not the machine was functioning properly or if the test was accurate.

The intoxilyzer did not provide a sample which can be retained for retesting defendant's breath for its alcoholic content and therefore People have made it impossible for defendant to check the results of the test. The California Supreme Court in *People v. Hitch* (1974) 12 C. 3d 641 at 652 have affirmed the right of the defendant to receive a sample of his breath for retesting. The Court in that case stated in pertinent part:

"As we have explained, the test ampoule, its contents and the reference ampoule customarily used in the test constitute material evidence on the issue of the driver's guilt or innocence of the charge of driving a vehicle under the influence of intoxicating liquor. We conclude that the investigative agency involved in the test *has a duty to preserve and disclose such evidence.*"

12 C. 3d 641 at 652, 117 Ca. Rptr. 9 (emphasis added).

More recently and in the case of *People v. Nation*, 26 C. 3d 169, the Supreme Court considered the prosecution's failure to preserve a sample of the defendant's semen with respect to charges for lewd and lascivious conduct on a child, and whether or not this failure to preserve such a sample deprived the defendant of his constitutional due process rights. The Court, referring to *People v. Hitch* (supra), affirmed the fact that the prosecution has an obligation and duty to preserve such evidence, even in the absence of a request for its preservation. The Court stated in pertinent part:

"In *People v. Hitch* (citation), we held that the obligation to disclose the existence of material evidence places on the state *a correlative duty to preserve such evidence even without a request therefor*, and directed that in the future law enforcement agencies take reasonable measures to ensure its adequate perservation."

26 C. 3d 169 at 175 (emphasis added).

The thrust of defendant Nation's appeal is identical to that of defendant Ward here, that is, that if law enforcement agencies take or recover a sample, they have a duty to take reasonable steps to preserve that evidence and make it available to the defense. More importantly, and inasmuch as the Supreme Court's decision in *Nation* utilized the principles in the *Hitch* case (which dealt with a breath sample in a 23102a(a) case), the *Nation* decision should be completely applicable to breath samples as well.

The Supreme Court in *People v. Nation* further indicated that the imposition of such a duty not only protects the due process rights of the defendant, but also society's interest in the integrity of the judicial system. The Court stated:

"The duty to preserve critical evidence enhances the reliability of the trial process. . . . The duty of the prosecution is not simply to obtain convictions, but to fully and fairly present to the court the evidence material to the charge."

26 C. 3d 169 at 177.

Certainly the breath sample in the instant case is the most "critical" evidence in the case. The results of the intoxilyzer or the other blood alcohol tests impose a heavy presumption against a defendant, a presumption which, as this Court well knows, is difficult to overcome.

Therefore it would appear that the prosecution and law enforcement agencies have a duty to take reasonable steps to preserve and retain a defendant's breath sample in order to allow that defendant an opportunity to retest the sample and scrutinize the accuracy of the intoxilyzer. Preservation and retention of such a sample cannot be considered unreasonable or an overbearing burden on the prosecution in light of the fact that such preservation and retention of breath samples were available previously when county law enforcement agencies utilized the services of Ultra Chem Corporation. Further, the defendant requests the Court to take judicial notice of the testimony of the expert which was presented in an identical motion before this Court in the case of *People v. Steven L. Haslam*, Case No. 29904-0, and the factual determinations made thereon by the Honorable Joseph R. Longacre, Jr., in his **MEMORANDUM OF DECISION AND ORDER** on that case dated October 8, 1980. Judge Longacre, finding no unreasonable burden upon law enforcement agencies to preserve such breath samples, stated in pertinent part:

"... There has been and is now available on the open market a crimping device, using an indium tube, which can be adapted to the present breath testing for a cost of approximately \$200.00 a machine. Once the initial cost is paid there is little if any upkeep thereon. The crimping device was demonstrated to the court and it is an exceedingly simple process in its operation. The expert testified that the cost for collection of breath sample approximates \$7.00. The crimping device can be used by police officer personnel and can be done simultaneously with the testing that is now being accomplished by such personnel. The machine and method of operation are approved by the Department of Public Health of California."

MEMORANDUM OF DECISION AND ORDER, October 8, 1980, Page 8.

Inasmuch as the *Haslam* case as well as the instant case arise out of the same judicial district and concern the same intoxilyzer, factual determinations made by Judge Longacre set forth above are equally applicable to the circumstances of the instant case.

It is clear under the *Hitch* and *Nation* decisions that due process requires that the defendant have a reasonable opportunity to test the breath sample which will be used against him. If the defendant is unable to test the breath sample and therefore the accuracy of the machine which will create a critical presumption against him, defendant's due process rights are effectively denied him. This denial works a severe hardship on the defendant's preparation of his case and detrimentally effects the fundamental fairness of any trial which follows.

Title 17, Article 6, Sections 1220 through 1225 of the California Administrative Code appropriately comply with the holding of the *Hitch* and *Nation* decisions. Those administrative code sections direct the retention and preservation of a blood or urine sample which is tested to determine the blood alcohol level of a defendant. By mandating the retention of such samples, a defendant's due process rights are kept intact. The defendant is afforded the opportunity to further test the sample and thereby determine the accuracy or inaccuracy of the test results which will be used against him. There are no similar provisions to protect the defendant's due process rights by mandating preservation of breath samples and therefore the above referred to sections, 1220 through 1225, do not comply with the holding in the *Hitch* and *Nation* decisions.

The California Legislature, through Section 23126 of the Vehicle Code, gives equal weight to the results of any breath, blood or urine tests administered to a defendant for purposes of establishing the presumption of intoxication. However, the defendant is denied any real ability to combat the test which generates that presumption should he have the uninformed misfortune of selecting an intoxilyzer to measure his blood alcohol level.

The defendant in the instant case, by selecting the intoxilyzer with the "help" of the law enforcement authorities, made the retesting of his breath sample impossible and any rights which the defendant had to scrutinize the authenticity and accuracy of the test results were summarily abolished. Therefore the introduction of the results of this intoxilyzer test into evidence would constitute a denial of the defendant's right to due process.

It is respectfully submitted that we are dealing here with a critical and extremely important privilege, i.e., the right to drive a vehicle upon the public highways of the State of California. The Court can suspend that essential privilege on a first conviction and it will necessarily be suspended for one year on a second conviction within five years. These suspensions are binding even against driving to and from employment. Therefore the Court here is sitting in judgment on an issue which strikes at the essence of our society's basic social unit, the family. Without a wage earner and without income, the family cannot survive or will have great difficulty in surviving without public assistance. Therefore this Court should take a very careful look at all the ramifications of this breath test without preservation of a verification sample and should insist, where so much is at stake in so many of these cases

in the way of economic impact, that the same protections of fairness be afforded the driver who takes the breath test as the driver who takes the blood or urine test.

Probably the explanation for why Title 17 of the California Administrative Code does not provide for retention of the breath test sample is that at the time of the enactment of Sections 1220 through 1225 of Section 7 there was no adequate equipment to capture and retain a sample, but that is no longer the case, and this inequity should be "set right" by this Court.

Since it is within the discretion of the trial court to exclude such test results, the defendant respectfully moves this Court to exclude the results of the intoxilyzer from the evidence presented at the trial in this matter.

Dated: February 5, 1981.

J. FRED HALEY

Attorney for Defendant

EXHIBIT A

HINE INCORPORATED

357 Tehama St., San Francisco, California 94103 (415-777-2210), mailing address: P.O. Box 7604 Rincon Annex, San Francisco, CA 94120

2 December 1980

Mr. J. Frederick Haley
Attorney at Law
Ordway Building—One Kaiser Plaza
Oakland, CA 94612

RE: People v. Gregory M. Ward

DOA: 7/6/80 Municipal Court #31381
Our File: MLA-3906

Dear Mr. Haley:

Reference is made to your letters dated 24 October, 24 November 1980 and our consultations and conversations which followed in the above captioned matter. Based upon my preliminary review of facts in the case and consultations had with you for preparation for expert witness testimony from the toxicological point of view, I offer the following in declaration form:

1. Records show that an Intoxilyzer breath test of subject's breath was made for determination of forensic blood alcohol value. The breath samples and analyzed by the Intoximeter were discarded following the non-destructive test performed according to usual procedures. Additional breath samples from the accused were not taken and retained to be made available for independent defense testing for determination of accuracy and reliability of the alleged forensic blood alcohol value obtained by the prosecution's test.
2. Such procedures for collection and retention of subject's breath for later testing by defense can be performed using the California Department of Health approved Indium tube crimper device which provides for the encapsulation of breath samples for retention of items of breath to become evidence. Such a device has been used by Contra Costa County in the past for collection and preservation of breath evidence samples.

3. Preliminary review of records and certain facts in the case show a considerable and significant disparity between the alleged blood alcohol value for defendant from prosecution's Intoxilyzer test and other categories of facts including calculation of blood alcohol from drinks consumed, field sobriety test performance, driving of the vehicle, general demeanor and outward impression of accused. In order to resolve this disparity in the facts I need to have a sample of subject's breath for testing to effectively participate as a toxologist in the preparation of this case with the attorney for trial.
4. Even though a breath sample is not available for testing and is essential for effective evaluation of the case in my opinion it would be essential that certain records and samples bearing on the prosecution's Intoxilyzer test results be made available for review. These should include water alcohol reference control samples (Simulator and Calibration Standards) used for periodic testing of the Intoxilyzer instrument and the Simulator Calibration solution used for defendant's test, copy of records of preventive maintenance for the Intoxilyzer machine used, results of periodic calibration and testing of Intoxilyzer, records of service and preventive maintenance for Intoxilyzer, notes and laboratory results and records of preparation of water alcohol calibration solutions used in quality assurance program, copy of records of quality assurance procedures, copy of records of training and certification for operator of Intoxilyzer for defendant's test, records of results of Department of Health Alco-

hol Check Samples periodically issued and tested for licensing of forensic alcohol laboratory, copy of record showing test results for subject and checklist of performance of test and calibration negative and positive controls.

5. Without the receipt of the foregoing discovery I am unable to participate effectively as a technical consultant as to toxicological aspects and preparation of the case with you. This is of particular importance and concern to me as there was not retained a sample of subject's breath so that the correctness of the blood alcohol value can be checked as to correctness by re-testing the retained breath sample. This situation allows an item (samples of subject's breath) taken to become evidence in the case to be used by the prosecution consumed by the prosecution and then the results used unverified at the time of trial as evidence.

If you have any questions about the information provided please advise me accordingly.

I declare under penalty of perjury that the foregoing is true and correct. Executed on 2 December 1980 at San Francisco, California.

/s/ Kenneth Dean Parker

Very truly yours,
/s/ Kenneth Dean Parker
M. Crim., D-ABFT
Toxicologist/Criminalist

"EXHIBIT B"

J. FRED HALEY
Attorney at Law
One Kaiser Plaza
Oakland, California 94612
834-9977

No. 31381

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF CONTRA COSTA

WALNUT CREEK—DANVILLE JUDICIAL DISTRICT
PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff

vs.

GREGORY MOLLER WARD,

Defendant

DECLARATION OF GREGORY MOLLER WARD

I, GREGORY MOLLER WARD, defendant herein, declare:

On or about July 6, 1980, I was arrested by Officer R. K. English, Jr. of the California Highway Patrol for an alleged violation of Vehicle Code §23102a. Upon arrest I was transported by the arresting officer to the Walnut Creek Police Department, where I was given a breath test to determine intoxication. The breath test was administered by Officer G. Chellew of the California Highway Patrol.

At no time prior to being given the breath test was I offered any option of taking either a breath, blood or urine test to determine intoxication. I was merely given the breath test without being offered a choice of either of the other two tests.

At no time prior to being given the breath test was I informed that a sample of my breath would not be retained for future retesting by a toxicologist of my selection. Neither was I informed, since I was not given the choice of taking a blood or a urine test, that if I was given one of those two tests a sample of my blood or urine would be retained for future retesting by a toxicologist of my selection.

Had I known that a sample of my breath would not be retained for future retesting and verification, whereas a sample of my blood or urine would be so retained, I would have requested that I be given either a blood or a urine test rather than a breath test.

I do not believe that at the time of my arrest on July 6, 1980, I was under the influence of alcohol to such an extent that it impaired my ability to drive an automobile.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on February 10, 1981, at Lafayette, California.

/s/ Gregory Moller Ward

WILLIAM A. O'MALLEY
District Attorney
County of Contra Costa
Deputy District Attorney
1957-C Parkside Drive
Concord, California 94520
671-4335

No. 31381-7

IN THE MUNICIPAL COURT OF THE STATE OF
CALIFORNIA, COUNTY OF CONTRA COSTA
WALNUT CREEK—DANVILLE JUDICIAL DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA

vs.

GREGORY WARD,

Defendant.

MOTION FOR DISCOVERY

Discovery in the above entitled case is hereby requested as to all evidence relating to the Intoxilyzer used to determine the defendant's blood alcohol concentration.

Dated: 26 Feb. 81

/s/ J. Fred Haley
Defense Attorney

No. 25592 (Trial Court No. 29684-8)	
25616	30410-5
25617	30226-5
25717	31381-7
25718	32153-9

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA
APPELLATE DEPARTMENT

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff & Respondent

vs.

GALE BERNELL BERRY,

RICHARD GLEN LARSON,

RICHARD GLEN LARSON,

GREGORY MOLLER WARD,

GREGORY MOLLER WARD,

Defendants & Appellants

ORDER

(Filed December 4, 1981)

Judgments of conviction in the above-entitled matters, made and entered in the Municipal Court of the Walnut Creek-Danville Judicial District, are affirmed.

The Court, on its own motion, hereby certifies the above-entitled cases to the Court of Appeal for the following reasons:

1. The issue of equal protection of laws as applied to the intoxilyzer machine, which does not preserve a breath sample for subsequent testing, has not heretofore been decided.
2. The Supreme Court of Colorado in the case of *Garcia v. The District Court*, 589 P.2d 924, has ruled that a defendant must be given a separate sample of his breath test if that test is to be used in evidence.

3. A possible review of *People v. Miller*, 52 CA3d 666, in light of the arguments made in the brief; and

4. The great importance of a resolution of this issue in view of the new legislation relating to driving under the influence.

/s/ MARTIN E. ROTHENBERG,
Presiding Judge.

/s/ WAYNE A. WESTOVER,
Judge.

/s/ NORMAN SPELLBERG,
Judge.

I, J. R. OLSSON, County Clerk and Clerk of the Supreme Court of the State of California, in and for the County of Contra Costa, do hereby certify that the foregoing is a true copy of the original judgment entered by said Court in the above entitled cause on the day of, 19....., and now remaining of record in this Court.

OFFICE OF THE CLERK

Court of Appeal

State of California

FIRST APPELLATE DISTRICT
CLIFFORD C. PORTER, Clerk

May 14, 1982

DEPUTIES

Richard J. Eyman, Chief Deputy

Roy F. Lippi

Leo A. Weissmann

Walter McAdam

Betty Kavanagh

R. D. Barrow

D. J. Gulliford

Penny Lawrence, Secretary

SAN FRANCISCO 94102

4154 State Building

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557-1896

J. Frederick Haley

Attorney at Law

One Kaiser Plaza

Oakland, California 94612

Charles C. Kirk

Deputy Attorney General

6000 State Building

San Franciseo, California 94102

Re: Case No. A017265 (1/Crim. 23779)

In re Ward on Habeas Corpus

Division Four

Dear Counsel:

The Court has directed me to invite counsel to submit letter briefs indicating whether the trial record in this case, or judicially noticeable materials, provide answers to the following questions:

- (1) Is it feasible to require breath samples to be pre-useful results?
- (2) Would later testing of such a sample yield useful results?

The pertinence of these questions lies in their relation to a possible duty to preserve a breath sample when an intoxilyzer is used. See *People v. Hitch* (1974) 12 Cal.3d 641.

Your responses should be received by June 1, 1982.

Very truly yours,
/s/ C. Porter
Clerk

JOHN A. PETTIS
Attorney at Law
1034 Court Street
Martinez, CA 94553
Telephone: (415) 229-0900
Attorney for Defendant

No. 29684-8

MUNICIPAL COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

v.

GALE BERNELL BERRY,
Defendant.

MOTION FOR DISCOVERY

Date: 9/18/80
Time: 9:30 a.m.
Dept. 2

(Filed September 5, 1980)

This Motion is directed not only to the District Attorney of Contra Costa County but to all law enforcement officers, agents, agencies, bureaus, departments, employees and attorneys prosecuting the above-entitled action (hereinafter collectively called the "PEOPLE"). Defendant will move for an Order requiring the PEOPLE to do as follows:

1. Supply the defendant's attorney with one (1) copy (by Xerox reproduction, or other method of comparable quality) of each of the following:
 - A. A complete set of engineering drawings, plans, and specifications of the Omiceron Intoxilyzer such as was used to test the alcoholic content of the defendant's breath on the night the incident occurred.
 - B. The serial number and date of manufacture, together with the date of delivery, to the Walnut Creek Police Department of the Omiceron Intoxilyzer unit in question.
 - C. The full corporate name and address of the manufacturer of the intoxilyzer unit in question.
 - D. Copies of all printed or written test and research data submitted by the manufacturer of the instrument to the Department of Justice, the Department of Health, and/or the Department of General Services, or to the criminal investigation division of the State of California or the Attorney General's Office or the District Attorney of the County of Contra Costa which pertain to the workings, specificity, selectivity, or accuracy of the machine in question, including but not limited to scientific and mechanical data.
 - E. Any data of similar kind now in the possession of any agency as set forth above which is in the possession or under the control of said agency, but which was not submitted by the manufacturer of the machine, but which was either independently gathered by said agency or submitted by parties other than manufacturer of the instrument.
 - F. A copy of the complete maintenance history of the Omiceron Intoxilyzer in question.

- G. The complete text of copies of any directive notice or bulletin, or item of a similar type, as issued to the using agencies by any of the above manufacturer of the instrument involved.
- H. A copy of the instruction manual as supplied with the particular instrument in question, together with copies of each other instruction manual that has been supplied by the manufacturer of the machine or by any governmental agency involved prior to or subsequent to the issuance of the manual as delivered together with the machine.
- I. The results and all supporting data related thereto now in the possession or under the control of any governmental agency as mentioned above herein of any comparative tests between the Omicron Intoxilyzer and any other breath-testing machine.
- J. The results of each and every breath test as run on the Omicron Intoxilyzer now in the possession of the Walnut Creek Police Department between the dates of December 30, 1980 to the present.
 - 2. Allow the defendant's attorney to examine any real evidence relevant to this case not mentioned above which is in the possession of, or subject to the control of the PEOPLE.
 - 3. To allow defendant's attorney and defendant's expert witnesses access to the Omicron Intoxilyzer instrument now in the possession of the Walnut Creek Police Department upon the giving of 48 hours notice for the purpose of examining and testing said machine as against the plans and specifications as set out by the manufac-

turer, said inspection to be carried out between the hours of 8:00 a.m. and 5:00 p.m. Monday through Friday, excluding holidays therefrom, with an expert from the Department of Justice present.

4. Provide the names and addresses of all witnesses, particularly expert witnesses, who will testify at trial as to the conduct, results or interpretation of the breath analysis tests performed on defendant.

5. Provide the original air sample taken from the defendant, the original reference sample, and the disposable sanitary mouthpiece/saliva trap used in the testing of the defendant.

6. Any and all records, documents, notations, memoranda, papers, and records relating to the installation, maintenance, calibration, and repair of the Omicron Intoxilyzer in use by Walnut Creek Police Department on January 16, 1980 (number unknown) from December 1, 1979 to March 31, 1980.

7. Any and all records, documents, notations, memoranda, papers and records relating to the installation, maintenance, calibration, and repair of the Omicron Intoxilyzer in use by Walnut Creek Police Department on January 16, 1980 (number unknown) from December 1, 1979 to March 31, 1980. Said records are to include, but are not limited to, the names of all persons taking and administering any test on said machine together with the counter number, date, time result and the Omicron Intoxilyzer Check List and graph of each such test.

8. The Record of Omicron Intoxilyzer usage for the Omicron Intoxilyzer in use by Walnut Creek Police De-

partment on January 16, 1980 from December 1, 1979 to March 31, 1980.

9. Any and all literature, brochures, pamphlets, memoranda and/or manufacturer publications supplied to the Walnut Creek Police Department, or anyone else relating to the installation, maintenance, operation, calibration, and/or repair of the Omicron Intoxilyzer, including literature dealing with the manufacturer's recommended operating procedures for the detection of alcohol in the breath of persons under suspicion of driving a motor vehicle under the influence of alcohol.

This Motion may be deemed severable as to objects and means of discovery mentioned herein above; may be granted on such other, further, or different terms and conditions as are reasonable and just; and will be based on this notice, the supporting points and authorities attached hereto, the pleadings the records and files and documents, and oral and documentary evidence to be presented at the hearing.

Dated: September 5, 1980.

Respectfully submitted,
/s/ JOHN A. PETTIS,
Attorney for Defendant

(Caption Omitted)

No. 29684-8

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR DISCOVERY

1. Absent some governmental requirement that the information be kept confidential for the purpose of law

enforcement, the State has no interest in denying accused access to all evidence that can throw light on issues in this case. *People vs. Riser* (1956) 47 Cal. 2d 566; cf. *In Re Ferguson* (1971) 5 Cal. 3d 525.

2. Obligation of the prosecution is not to convict, but to see that, as far as possible, the truth emerges. This is also true of the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Process Clause of the California Constitution. No proper interest of the State is served by its concealment of information which is material, generously conceived, to the case at bench, including all possible defenses. *In Re Ferguson, supra*, 5 Cal. 3d 525, 531-532; *Giles vs. State of Maryland* (1967) 386 U.S. 66, 96, 97, (87 S.Ct. 793, 808, 809) (Fortas, concurring opinion).

3. Certain evidence has specifically held discoverable, including: Laboratory reports (*Walker vs. Superior Court* (1957) 155 Cal. App. 2d 134, 139-141) and real evidence *People vs. Lindsay* (1964) 227 Cal. App. 2d 482).

4. If information is not actually in the possession of the PEOPLE, but is available to the PEOPLE, they may be required to obtain it and disclose it to the defendant. *Engstrom vs. Superior Court* (1971) 20 Cal. App. 3d 240; *Hill vs. Superior Court* (1974) 10 Cal. 3d 812.

5. Defendant has the right to inspect, view, hear and copy before trial all relevant evidence subject to discovery. *People v. Garner* (1961) 57 Cal. 2d 135.

6. The right to pre-trial discovery is fundamental to a fair trial and discovery cannot be denied on the basis

that no showing has been made that the documents exist, as such a requirement would frustrate all discovery. Defendant is entitled to discovery by showing that he cannot obtain the information by his own efforts and the requested discovery will reasonably assist him in the preparation of his defense. *Hill vs. Superior Court, supra*, 10 Cal.3d 812; *Pitchess vs. Superior Court* (1974) 11 Cal.3d 541; *Eleazer vs. Superior Court* (1970) 1 Cal. 3d 847.

7. The names and addresses of expert witnesses are essential for the adequate preparation of the defense case. See *Norton vs. Superior Court* (1959) 173 Cal. App. 2d 133; *People vs. Johnson* (1974) 38 Cal. App. 3d 228. In *Johnson*, the Court particularly held that the defendant is entitled to the identity and the reports of the State's experts.

8. Evidence taken from the defendant is subject to inspection and testing by the defense. See *People vs. Washington* (1957) 163 Cal. App. 2d 134. Here the breath sample must be produced for defendant's counsel and expert to test the accuracy of the purported results. See *People vs. Hitch* (1974) 11 Cal.3d 159. Similarly, the reference sample and the sanitary mouthpiece are necessary evidence to permit the defendant to assess the accuracy of the test results.

Dated: September 5, 1980

/s/ JOHN A. PETTIS
Attorney for Defendant

(Caption Omitted)

No. 29684-8

DECLARATION IN SUPPORT OF MOTION FOR
DISCOVERY

I, JOHN A. PETTIS, hereby declare:

1. I am the attorney for the defendant in the above-entitled action.
2. Defendant submitted to two (2) breath tests on the Omicron Intoxilyzer subsequent to his arrest for a violation of Section 23102(a) of the Vehicle Code. The results of the two tests were .20.
3. I am informed and believe that certain information as set forth above is in the possession of, or available to, the District Attorney or other governmental agency from which said information can be obtained.
4. I am informed and believe that some or all of said officers or agencies have in their possession or under their control some or all of the information described on the Notice of Motion attached hereto, and that it is necessary that such information be made available to the defendant and to his attorney in order that they may properly prepare said cause for trial. Said information requested is material and relevant to the trial of said action in that it involves the machine used to test the breath of the defendant for its alcoholic content and its relation to the percentage of alcohol in the blood of the defendant which is the foundation in support of the presumption of intoxication as found in the California Codes and will shed light

on the accuracy and specificity of the machine in question, both in general and as used directly in this case.

5. I am informed and believe that the information as set forth above is solely under the control of the prosecution and is not known or available to the defendant or his counsel.

6. I believe that it is necessary in order to prepare for trial that I be afforded prompt and reasonable access to all such evidence and information as set forth above available to the PEOPLE which meets the description as set forth in the attached Notice of Motion.

7. I believe that the accuracy and specificity of the Omicron Intoxilyzer as used herein to test the breath of the defendant is suspect and that the discovery of the information as requested above and its exposure to the defendant's experts will provide the basis for a defense for the defendant in this case.

8. I declare under penalty of perjury that the foregoing is true and correct except for those things that are stated on information and belief, and those I believe true.

Dated: September 4, 1980.

/s/ JOHN A. PETTIS
Attorney for Defendant

(Proof of Service Omitted in Printing)

(Caption Omitted)

No. 29684-8

**NOTICE OF MOTION AND MOTION TO EXCLUDE
RESULTS OF AN INTOXILYZER TEST**

(Filed November 20, 1980)

**TO: DISTRICT ATTORNEY OF CONTRA COSTA
COUNTY**

NOTICE IS HEREBY GIVEN that on Thursday, December 11, 1980 at 9:30 a.m., or as soon thereafter as the matter can be heard in Department 1, the defendant GALE BERNELL BERRY, by and through his attorney, JOHN A. PETTIS, will move the Court for an order to exclude results of an intoxilyzer test taken on defendant by WALNUT CREEK POLICE DEPARTMENT on January 16, 1980.

This Motion will be based on this Notice of Motion, the Points and Authorities attached hereto, the pleadings, records, files in this action and oral and documentary evidence to be presented at the hearing on the Motion.

Dated: November 18, 1980.

/s/ JOHN A. PETTIS
Attorney for Defendant

(Caption Omitted)

No. 29684-8

POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO EXCLUDE RESULTS OF AN INTOXI-
LYZER TEST

(Filed November 20, 1980)

STATEMENT OF FACTS

On January 16, 1980, the defendant, GALE BER-NELL BERRY, was stopped by Officer P. WORKMAN, Badge No. 8047, of the California Highway Patrol, on suspicion of driving under the influence of alcohol.

Defendant BERRY was given a breath test, by use of intoxilyzer at WALNUT CREEK POLICE DEPARTMENT. The test produced a reading of .20.

The intoxilyzer, unlike other devices in use protest-ing the aleoholic content of a suspect's breath, had no ampule which can be removed for later retesting.

The intoxilyzer utilizes a technique known as "infra-red absorption". Due to the non-destructive properties of infrared testing, *it is possible* with the intoxilyzer to pre-serve the alcohol in the actual sample analyzed by the instrument for subsequent reanalysis at a later date.

As the prosecution failed to preserve this sample, no independent analysis of defendant's breath could be made to check the accuracy of the test.

Additionally, until March 16, 1980, suspects could have been brought to the offices of the ULTRACHEM CORPORATION where a breath test could be made and a sample obtained for later analysis.

ARGUMENT

I

DEFENDANT'S RIGHT TO HAVE AN IMPARTIAL
ANALYSIS OF BREATH TEST

The intoxilyzer did not provide a sample which can be retained for retesting defendant's breath for its alcoholic content. California Vehicle Code section 13354 (b) provides in part:

The person tested may, at his own expense, have . . . any other person of his own choosing administer a test in addition to any administered at the discretion of a peace officer for the purposes of determining the amount of alcohol in his blood at the time alleged as shown by chemical analysis of his blood, breath or urine. . . .

II

BREATH SAMPLE IF MATERIAL EVIDENCE

The breath sample given by defendant at the time of his arrest is material evidence of his guilt or innocence. This is stated more fully in *People vs. Hitch*, 12 Cal 3d 641, 117, Cal Rptr 9, 527 P2d 361 (1974):

". . . the test ampoule, its contents and the reference ampoule customarily used in the test constitute *material evidence* on the issue of the driver's guilt or driver's guilt or innocence of the charge of driving a vehicle under the influence of intoxicating liquor. We conclude that the investigative agency involved in the test has a *duty to preserve and disclose such evidence.*" (emphasis added)

Because the breath sample was destroyed, defendant is without the opportunity to have the evidence against him examined by a person of his own choosing. Defendant

is thereby denied due process. *Van Halen vs. Municipal Court*, 3 Cal App 3d 233, 83, Cal Rptr 140 (1969).

III

STATE HAS DUTY TO PRESERVE EVIDENCE

If the state recovers a sample, it has the duty to take reasonable steps to preserve the evidence and make it available to the defense (*People vs. Nation*, 1980, 161 Cal Rptr 299 at page 302).

The Supreme Court's interpretation in *People vs. Nation* of their holding in *People vs. Hitch* is supportive of defendant's contention that there is a duty to preserve such evidence.

"In *Hitch* (citations) we held, that the obligation to disclose the existence of material evidence places on the State a correlative duty to preserve such evidence even without a request therefore." (*People vs. Nation*, Id at page 302)

Defendant asserts that there exists a reasonable possibility that a second test of the sample would be favorable to him on the issue of guilty or innocence and that the arbitrary deprivation of this material evidence erodes the integrity of the judicial system and the reliability of the trial process (*People vs. Nation*, Id, at page 202).

SUMMARY

Since the intoxilyzer utilized by the WALNUT CREEK POLICE DEPARTMENT fails to preserve a breath sample for retesting, the introduction of the results of this test into evidence would constitute a denial of defendant's right to due process.

Additionally, the defense relies on the Court's holdings in *People vs. Nation*, which did not require a request for a sample as a condition precedent to preservation of such evidence, and that it is immensely reasonable for the State to capture and preserve a second breath sample where there is an available, simple, inexpensive, and just method for doing so.

Based on the above Points and Authorities, defendant respectfully moves the Court to exclude the results of the breath test from the evidence presented at trial.

Dated: November 18, 1980.

Respectfully submitted,

/s/ JOHN A. PETTIS
Attorney for Defendant

(Proof of Service Omitted in Printing)

A017266

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

In re
GALE BERNELL BERRY
On Habeas Corpus

TRAVERSE/DENIAL TO RETURN TO ORDER
TO SHOW CAUSE

(Filed June 18, 1982)

JOHN A. PETTIS
Attorney at Law
1034 Court Street
Martinez, California
Telephone: (415) 229-0900

Petitioner GALE BERNELL BERRY hereby traverses the Return to the Order to Show Cause and by this pleading states:

I

Petitioner hereby realleges each of the allegations of his petition on file herein and denies each and every material allegation contained in the Return that is inconsistent therewith. Petitioner hereby incorporates the allegations of the petition as if fully set forth herein.

II

Petitioner hereby incorporates by reference and relies on all the pleadings and papers contained in the record in the cases of GALE BERNELL BERRY, NO. A017266, GREGORY MOLLER WARD, NO. A017265 and ALBERT WALTER TROMBETTA, NO. A016358.

III

Petitioner realleges that it is feasible to preserve a sample of the breath and that such a sample would yield useful results at such time that it is retested.

WHEREFORE, petitioner respectfully prays that the Court grant petitioner habeas corpus relief; suppress the results of the breath test; and grant petitioner such further relief as the Court deems proper.

DATED: June 17, 1982.

Respectfully submitted,

JOHN A. PETTIS,
Attorney for Petitioner

VERIFICATION

I am the petitioner in the above-entitled proceeding. I have read the foregoing traverse and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

Executed on June 1, 1982, in Martinez, Contra Costa County, California.

I declare under penalty of perjury that the foregoing is true and correct.

GALE BERNELL BERRY

ARGUMENT

THE FAILURE TO DISCLOSE MATERIAL EVIDENCE IS A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Petitioner contends that the People have a duty to disclose evidence which might be favorable to the defense of the accused and thereby have a correlative duty to preserve that evidence. Failure of this duty constitutes a violation of due process and thereby necessitates the imposition of sanctions.

The Court in *United States v. Bryant*, 439 F2d 642 (1971) stated that "the due process requirement [of disclosure] applies to all evidence which might have led the jury to entertain a reasonable doubt about [defendant's] guilt, and that this test is to be applied generously to the

accused when there is substantial room for doubt as to what effect disclosure might have had."

The Court in *Brady v. Maryland*, 373 U.S. 83, held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution." (The Court in *People v. Hitch*, 12 C.3d 641 (1974) stated that "in some circumstances the prosecution must, without request, disclose substantial material evidence favorable to the accused.")

Hitch, supra, also held that "the results of the breathalyzer test by their very nature constitute material evidence on the issue of guilt or innocence upon a charge of drunk driving."

In the instant case petitioner was tested on an intoxilyzer - a breath testing device used in the County of Contra Costa. In keeping with the spirit of *Hitch*, the test results of the intoxilyzer are material to the guilt of the accused and therefore subject to the duty of disclosure which the courts have placed on the People.

The People contend that there is no duty to preserve a sample. Petitioner turns to the Court in *United States v. Bryant*, supra. There the Court held "that the duty of disclosure attaches in some form once the Government has first gathered and taken possession of the evidence in question. Otherwise, disclosure might be avoided by destroying vital evidence before prosecution begins or before defendants hear of its existence. Hence, we hold that before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation.

Only if evidence is carefully preserved during the early stages of investigation will disclosure be possible later." [emphasis added]

The Court in *Hitch*, using principles from informant cases stated:

"This Court also has recognized the duty of preservation of evidence required to be disclosed under the due process requirements of *Brady*. The People's duty to disclose the identity of an informant who is a material witness on the issue of guilt includes the duty to undertake reasonable efforts to obtain information by which the defense may locate such an informer. . . . In short, the prosecution has a *duty to undertake reasonable efforts to preserve* material evidence, to wit the testimony of the material informant. [emphasis added]

The People quote *People v. Miller*, 52 Cal.App.2d 666 (1975) in putting forth the premise that the evidence (the breath of the accused) gathered in the intoxilyzer was not evidence of which they could take possession. It is petitioner's contention that matter that can be "gathered" and tested is at those times possessed.

Petitioner cites *United States v. Bryant*, *supra* in which that Court stated:

"Technically it may be that evidence which cannot be found is not in the government's "possession". . . . But this line of reasoning is far too facile, and clearly self-defeating. The language of *Brady*, Rule 16 and the Jencks Act includes no reference to the timing of possession and suppression. . . ."

Thus petitioner contends that there is something to preserve when the intoxilyzer is used.

The *Bryant* court discussed sanctions for the suppression of evidence. The Court stated that sanctions would be imposed for bad faith suppression of evidence, but that exceptions would be made for good faith suppression. The Court stated further:

"An exception for good faith loss of important evidence must not be allowed to swallow the discovery rules and the burden of explanation on the Government must be a heavy one; but criminal convictions otherwise based on sufficient evidence may be permitted to stand so long as the Government made "earnest efforts" to preserve crucial materials and to find them once a discovery request is made."

"We hold that the sanctions for non-disclosure based on loss of evidence will be invoked in the future unless the Government can show that it has promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of a criminal investigation."

The *Hitch* court held that evidence that might have resulted from a retest of the ampoules would serve to impeach the test results of the police. The Court on that basis held that suppressing the test results would serve to balance the "improper failure to preserve potentially impeaching evidence."

CONCLUSION

Petitioner's right of due process was violated by the People's failure to preserve for disclosure, a sample of the breath that was used as evidence in the determination of said petitioner's guilt. Petitioner urges that the breath test result be suppressed as a sanction for violation of his constitutionally protected right.

DATED: June 17, 1982.

/s/ JOHN A. PETTIS,
Attorney for Petitioner

A017265

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

In re
GREGORY MOLLER WARD
on Habeas Corpus.

TRAVERSE/DENIAL TO RETURN TO ORDER
TO SHOW CAUSE

(Filed June 17, 1982)

J. FREDERICK HALEY
Attorney at Law
One Kaiser Plaza
Oakland, CA
(415) 834-9977

Attorney for Petitioner

Petitioner Gregory Moller Ward hereby traverses the Return to the Order to Show Cause of the People of the State of California and by this verified pleading states:

I

Petitioner Gregory Moller Ward realleges as though fully set forth at length herein and incorporates herein by this reference all of the allegations of Paragraphs I through XIV inclusive of this Petition for Writ of Habeas Corpus and the Motion of Points and Authorities accompanying said petition, filed in the Supreme Court of the State of California, No. 22560 and petitioner denies each and every allegation contained in the Return which is inconsistent therewith.

II

Petitioner Gregory Moller Ward hereby denies each and every allegation contained in paragraph II of the Return to the Order to Show Cause.

III

Petitioner Ward hereby incorporates herein and relies on the declarations, pleadings, court records, and other documents attached to his Petition which documents were labeled Exhibit A, B, C and pertain to the litigation at the Municipal Court, Superior Court, Appellate Department, and Court of Appeals, First District, Division Three which litigation gave rise to his Petition.

IV

Petitioner Ward hereby incorporates herein and relies on his letter brief dated June 7, 1982, filed herein. Petitioner Ward hereby incorporates herein and relies on the declarations attached hereto of: Declaration of Richard Kiszka, Exhibit "A"; Declaration of Ernest J. Williams, Exhibit "B"; and Declaration of Manley J. Luckey, Exhibit "C".

V

Petitioner Ward hereby incorporates herein and relies on the pleadings, records, transcripts and other documents filed heretofore with this Court involving the cases

of: *People v. Trombetta*, Court of Appeal, No. A016358; *People v. Cox*, Court of Appeal, No. A016374; and *In re Berry, on Habeas Corpus*, Court of Appeal, No. A17266.

VI

Petitioner is informed and believes, and upon such information and belief alleges the following:

1. That the Intoxilyzer Model 4011A captures, collects and possesses a breath sample during its analysis of said breath sample;
2. That it is feasible to require breath samples to be preserved for retesting when an Intoxilyzer 4011A is used;
3. That such a breath sample will produce readings of breath alcoholic content that are reliable, trustworthy and accurate;
4. That two methods for such preservation of a sample are readily and inexpensively available in the form of a) siliqua gel preserved sample tube; and b) Indium Tube Encapsulation kit.

WHEREFORE, petitioner respectfully prays that the Court, after a full hearing of all issues necessary for a deposition of petitioner's claim on merits, grant petitioner habeas corpus relief, order that petitioner be discharged from said restraint of liberty and grant whatever further relief is appropriate and in the interests of justice.

DATED: June 17, 1982.

Respectfully Submitted,

/s/ J. FREDERICK HALEY

Attorney for Petitioner

VERIFICATION

I, J. FREDERICK, HALEY, declare as follows:

I am an attorney at law duly licensed to practice before all courts of the State of California, and am the attorney for Petitioner herein.

I am authorized to file this Traverse/Denial to Return to Order to Show Cause on Petitioner's behalf. I am personally familiar with the matters stated in the foregoing Traverse/Denial to Return to Order to Show Cause and declare under penalty of perjury that the foregoing petition is true and correct of my knowledge except as to my matters which are therein stated on my information and belief and as to those matters I believe them to be true.

Executed on June 17, 1982, at Oakland, California.

/s/ J. FREDERICK HALEY

Attorney for Petitioner

ARGUMENT AND DECLARATIONS

The written argument and declarations will be submitted at the hearing on June 18, 1982. Please note that Petitioner has not had adequate time to prepare and submit this argument and obtain and submit the declarations prior to June 18, 1982; the Return to the Order to Show Cause was due, by Order of the Supreme Court of California, on May 10, 1982, and the Return is dated June 3, 1982, and was served on Petitioner thereafter. This Traverse/Denial to Return to Order to Show Cause and its accompanying Argument and Declarations will be resubmitted in its entirety on June 18, 1982.

A016358

(Sonoma Sup. Ct.
No. 209-C)

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

vs.

ALBERT WALTER TROMBETTA

Defendant and Appellant.

A016374

(Sonoma Sup. Ct.
No. 215-C)

THE PEOPLE,

Plaintiff and Respondent,

vs.

MICHAEL GENE COX, et al.,

Defendants and Appellants.

A017265
1 Crim. 23779

In re GREGORY MOLLER WARD
on Habeas Corpus.

A017266
1 Crim. 22517

In re GALE BERNELL BEPPY
on Habeas Corpus.

(Filed March 28, 1982)

These cases arise, in diverse procedural settings, from misdemeanor prosecutions for driving under the influence of intoxicating liquor (formerly Veh. Code §§ 23101, subd. (a), or 23102, subd. (a); now §§ 23153, subd. (a), or 23152, subd. (a), respectively). The issue raised is whether intoxilyzer breath results are rendered inadmissible in a drunk driving trial by virtue of the failure of law enforcement officials either (1) to preserve a retestable breath sample although a device which preserves breath samples for retesting is available, or (2) to inform the detained motorist that no retestable specimen will be preserved if he selects breath rather than blood or urine as the test medium.

In each municipal court case the defendant moved to suppress evidence obtained from an intoxilyzer breath test. (Pen. Code, § 1538.5) These motions were denied. Each defendant then appealed to the superior court which

affirmed the lower court order; the cases were then certified for transfer to this court. In the *Trombetta* and *Cox* groups of cases this court accepted transfer. It appears that *Trombetta* and its companion case have not proceeded to trial. The record does not indicate whether the cases in the *Cox* group have proceeded to trial; no judgment was entered in these cases.

An appeal may not be taken from a pretrial order of the municipal court. (Code Civ. Proc., § 904.2) The correct procedure in *Trombetta* and *Cox* would therefore have been for the defendants to wait until a judgment was entered in the municipal court and then appeal that judgment. Because no appealable order was challenged in *Trombetta* or *Cox* those appeals should have been dismissed by the appellate department of the superior court. (*People v. Superior Court (Scott)* (1980) 112 Cal.App.3d 602, 606.)

In the *Ward* and *Berry* cases judgments of conviction were followed by superior court appeals; transfers to the Court of Appeal were denied whereupon those defendants petitioned the Supreme Court for writs of habeas corpus. The Supreme Court issued orders in *Ward* and *Berry* to show cause before this court why relief should not be granted.

Each defendant was arrested for driving under the influence of alcohol. (Formerly Veh. Code §§ 23101, subd. (a), or 23102, subd. (a); now §§ 23153, subd. (a), or 23152, subd. (a), respectively). Each was asked to select any one of three blood alcohol level tests (breath, blood, or urine). Law enforcement officers urged the defendants

to select the breath test and each did select that test. The breath tests were conducted on an Omicron Intoxilyzer. Each defendant's breath registered an alcohol level of at least 0.10. No defendant was told that a breath sample would be saved.

The Legislature has established a presumption that a driver whose blood alcohol level is less than 0.05 percent is not under the influence of an alcoholic beverage. If the blood alcohol level is between 0.05 percent and 0.10 percent, no presumption arises. (Veh. Code, § 23155, subd. (a).) However, another statute provides "It is unlawful for any person who has a 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle upon a highway or upon other than a highway in areas which are open to the general public. . ." (Veh. Code, § 23152, subd. (b).) Thus, the statute establishes guilt where chemical blood alcohol tests prove that the percent of alcohol is 0.10 percent or more, without any showing of actual impairment.

Given the importance of accurate determination of blood alcohol levels, and the greater convenience of breath testing as opposed to testing of blood or urine, the Legislature has directed the State Department of Health Services to establish, by regulation, procedures to be used by law enforcement agencies in administering breath tests for the purposes of determining the concentrations of alcohol in a person's blood. (Health & Saf. Code, § 436.52.) These regulations are contained in Title 17 of the California Administrative Code, sections 1220 et seq. Three of the breath testing devices which require discussion were approved by the Department of Health Services on December 20, 1979: the intoxilyzer, the breathalyzer, and

the intoximeter field crimper-indium tube encapsulation kit.

A brief description of the operation of the intoxilyzer follows: Prior to any test, the device is purged by pumping clean air through it until readings of 0.00 are obtained. The breath test requires a sample of "alveolar" (deep lung) air (Cal. Admin. Code, tit. 17, § 1219.3); to assure that such a sample is obtained, the subject is required to blow air into the intoxilyzer at a constant pressure for a period of several seconds. A breath sample is captured in the intoxilyzer's chamber and infrared light is used to sense the alcohol level. Two samples are taken, and the result of each is indicated on a printout card. The two tests must register within 0.02 of each other in order to be admissible in court. After each test, the chamber is purged with clean air and then checked for a reading of zero alcohol. (See *People v. Miller* (1975) 52 Cal. App. 3d 666, 668-669.) The machine is calibrated weekly, and the calibration results, as well as a portion of the calibration samples, are available to the defendant.

The breathalyzer operates on a completely different principle. (See *People v. Hitch* (1974) 12 Cal. 3d 641, 644.) To conduct a breathalyzer test, the breath sample is captured in a glass ampoule containing exactly three cubic centimeters of a chemical solution. If alcohol is present, it changes the translucency of the solution. The alcoholic content is then measured by shining a beam of light through the solution. The test ampoule and the test solution can then be retained for retesting by the defendant.

Finally, the operation of the intoximeter field crimp-indium tube encapsulation kit must be considered. This "kit" can be used in the field to collect a breath sample which is separate from the sample collected by the intoxalyzer. The device is independent from the breath testing devices and is in effect only a breath *collection* as opposed to a breath *testing* device. The subject blows into an indium tube which captures the breath sample. The indium tube is a soft metal device used to capture and preserve a breath specimen for later analysis. The tube originally is in a single piece but when the sample is blown into the tube, it can be crimped to hold the breath sample in three separate compartments. These containers can then be placed in a gas chromatograph (intoximeter) device which will test the sample for blood alcohol content. The gas chromatograph is an approved device for blood alcohol determination; the indium tube is approved for use with the gas chromatograph if the sample is tested within 14 days of collection. (Instruments Approved for Breath Alcohol Analysis, Dept. of Health, Dec. 20, 1979.)

The defendants contend that there are three grounds upon which this court should require suppression of the evidence obtained from the intoxalyzer tests: the duty of the prosecution to preserve evidence, equal protection, and requirements of informed consent. We deal only with the first ground.

The contention is that, under *People v. Hitch, supra*, 12 Cal.3d 641, the failure of law enforcement personnel to capture and preserve a retestable breath sample violated due process and rendered the intoxalyzer results inad-

missible. In *Hitch*, the Supreme Court held that a law enforcement agency conducting a chemical test for alcohol has a duty to preserve and disclose all material evidence which the agency has gathered. The court held that a due process violation occurred when the defendant's test specimen and test solution from a breathalyzer test were discarded. The defendant's eventual attempts to utilize discovery to verify independently the alcoholic content of the ampoule, to ascertain that exactly three centimeters of the solution had been used, and to examine the glass ampoule itself for any defects which would alter the alcohol reading were thus unfairly frustrated. (*Id.*, at pp. 649-650.)

The *Hitch* court, in considering the admissibility of "breathalyzer" results, determined initially that the results of the blood alcohol test "by their very nature constitute material evidence on the issue of guilt or innocence upon a charge of drunk driving." (*Id.*, 12 Cal. 3d at p. 647.) The court held that the investigative agency involved in the test has a duty not only to disclose such material evidence but also to preserve it. Accordingly, the court stated that "where, as here, such evidence cannot be disclosed because of its intentional but nonmalicious destruction by the investigative officials, sanctions shall . . . be imposed for such nonpreservation and nondisclosure unless the prosecution can show that the governmental agencies involved have established, enforced and attempted in good faith to adhere to rigorous and systematic procedures designed to preserve the [evidence]. The prosecution shall bear the burden of demonstrating that such duty to preserve the [evidence] has been fulfilled." (*Id.*, at pp. 652-653.) If this burden is not met,

the results of the test are to be excluded at trial. Since the *Hitch* rule implements a federal due process standard, (*Id.*, at pp. 645, 646) it is unaffected by California Constitution, article I, section 28, subdivision (d). (See *Brosnanhan v. Brown* (1982) 32 Cal.3d 236.)

In the present cases, it is conceded that no effort was made to capture breath specimens for later testing by the defense despite the availability of the indium tube encapsulation kit. Petitioners contend that the intoxilyzer evidence should therefore have been excluded from trial.

In denying many recent motions to exclude intoxilyzer results, many lower courts have relied on *People v. Miller, supra*, 52 Cal. App.3d 666. In *Miller*, the Court of Appeal examined "the question [of] whether the recent decision of the Supreme Court (*People v. Hitch*, 12 Cal.3d 641) should be extended to render inadmissible the results of all chemical tests of breath conducted by use of the 'Omicron Intoxilyzer.'" (*People v. Miller, supra*, 52 Cal.App.3d at p. 668.) The *Miller* court determined that "*Hitch* merely holds that evidence which the prosecution once possesses must be held. The test by intoxilyzer . . . may have 'gathered' evidence in the sense of placing the breath in the chamber, but it was not evidence of which the government could 'take possession.' The only element reducible to possession was the printout card, which has been preserved." (*Id.*, at pp. 669-670.) *Miller* may be factually distinguished in that there, no means had been shown by which to preserve a breath sample; the technology has now evolved so that such preservation is possible by use of the indium tube encapsulation kit. A new analysis is therefore in order.

Here, where the evidence has already been "collected" by the prosecution, the question is whether the specimen may be exhausted in testing without taking available steps to obtain and preserve another specimen for re-testing.

The Colorado Supreme Court, confronted with a record that was, like ours, "replete with evidence that a sample of the defendant's breath could have been preserved inexpensively and expediently" held that the "failure of the state to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by state agents, is tantamount to suppression of that evidence. It is incumbent upon the state to employ regular procedures to preserve evidence which a state agent, in the regular performance of his duties, could reasonably foresee 'might' be 'favorable' to the accused.' (*Garcia v. Dist. Court, 21st Jud. Dist.* (Colo. 1979) 589 P.2d 924, 928, 929-930.) We are persuaded that the reasoning of the Colorado court is sound and that the same result should prevail in California.

In breath testing by means of the devices presently approved for use in California, the specimen actually tested cannot be retained. The indium tube, an approved device, can, however, be utilized to capture a contemporaneous specimen and preserve it for later testing. When an intoxilyzer is used, the law enforcement agency must employ rigorous and systematic procedures to ensure the preservation of the captured breath sample, or a contemporaneous similar sample, for testing by the defense unless there is a knowing waiver of that right. As with

Hitch, however, this holding will apply only prospectively to tests performed after this decision has become final with the exception that it will also be applicable to the cases now under review, including those not yet tried in which the present appeals must be dismissed.

It has been suggested that technology exists in the form of a device called "silica gel tubes" whereby the actual breath exhaled into the intoxilyzer could be retained. (See *People v. Riggs* (Colo. 1981) 635 P.2d 556, 558.) This attachment does not, however, appear on the list of breath testing instruments approved for use in California. Were this device to be approved by the Department of Health Services, it would, of course, provide another alternative method of complying with the *Hitch* requirements of evidence preservation. Law enforcement agencies are free to use their discretion to utilize whatever devices are available to meet this duty. Due process does not require the use of any particular instruments. It demands simply that where evidence is collected by the state, as it is with the intoxilyzer, the agencies must establish and follow rigorous and systematic procedures to preserve the captured evidence or its equivalent for the use of the defendant. (*People v. Hitch, supra*, 12 Cal.3d at pp. 652-653.)

The Trombetta and Cox groups of appeals are dismissed; in the Ward and Berry proceedings, writs of habeas corpus will issue granting new trials at which the intoxilyzer evidence will be excluded.

Certified for Publication.

POCHE, J.

I concur:

RATTIGAN, Acting P.J.

People v. Trombetta, (Cox, Ward & Berry)

A016358, A016374, A017265, A107266

I concur fully in the judgment and write separately only to emphasize that by this decision we do not prescribe or recommend any particular devices or procedures but hold simply that those before us in these cases do not satisfy the due process requirements of *People v. Hitch* (1974) 12 Cal.3d 641. In each case, the arresting officer urged the defendant to choose the breath rather than the blood or urine test but failed to inform him that as a consequence of this selection no sample would be retained. In none did the officer advise the driver of his right to preservation of a breath sample and obtain from him a waiver of that right. The Arizona Supreme Court has held that such a procedure is constitutionally adequate. (*Baca v. Smith* (1979) 604 P.2d 617, 618-620.) As no driver here gave a knowing and intelligent waiver of his right to preservation of evidence, that question is not reached here. Similarly, we do not consider here a situation in which police establish and diligently follow rigorous and systematic procedures for preservation of samples but circumstances beyond their control frustrate retention of a sample in a particular instance. As the majority opinion indicates, the core requirement of *Hitch* is establishment of and adherence to procedures which en-

sure fairness in the administration of field tests. The responsibility for designing those procedures lies with the Legislature and with state and local law enforcement agencies.

CHRISTIAN, J.

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MICHAEL D. TUYNMAN
DUANE P. SARTORI
BRIEN J. FARRELL

April 4, 1983
(Filed April 5, 1983)

Clifford C. Porter, Clerk
Court of Appeal
First Appellate District
350 McAllister Street, Room 4154
San Francisco, California 94102

Dear Sir:

RE: People v. Albert Walter Trombetta
and related cases
A016358
Sonoma County Superior Court No.: 209 C
Decision Filed March 28, 1983

As you know, this office represents Albert Walter Trombetta with regard to the above matter.

The purpose of this letter is to bring to the attention of the court an error in dates on page 4 of the decision. The decision at page 4 requiring correction reads as follows:

"Three of the breath testing devices which require discussion were approved by the Department of Health Services on December 20, 1979: the intoxilyzer, the breathalyzer, and the intoximeter field crimper-indium tube encapsulation kit."

In fact, the intoximeter field crimper-indium tube encapsulation kit was approved by the Department of Health on August 8, 1973. Also, various forms of the intoxilyzer and breathalyzer were also approved on the earlier date of 1973. The model of the intoxilyzer in question in the case of Trombetta was only approved in December of 1979 and that portion of the Court's opinion would be correct in that regard.

Defendant Trombetta's Exhibit "E" in evidence, together with the testimony set forth in the Reporter's Transcript at page 59 and 60, spells out the earlier date of approval of the intoximeter field crimper-indium tube encapsulation kit.

It is respectfully requested that you bring this clarification of dates to the Court's attention.

Very truly yours,

/s/ JOHN F. DEMEO

JFD/dh

CC: Honorable Lawrence G. Antolini
Judge, Municipal Court of the County of Sonoma
(#78402 TCP)

CC: John Van de Kamp, Attorney General
Attention: Charles R. B. Kirk, Esq.
Deputy Attorney General

CC: Ed Kuwatch, Esq.
CC: Scott A. Sugarman, Assistant Public Defender
County of Alameda
CC: J. Frederick Haley, Esq.
CC: Thomas R. Kenney, Esq.
CC: John Pettis, Esq.

III.

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION FOUR

A016358 (Sonoma Sup. Ct. No. 209-C)

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT WALTER TROMBETTA,
Defendant and Appellant.

A016374 (Sonoma Sup. Ct. No. 215-C)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL GENE COX, et al.,
Defendants and Appellants.

A017265 1 Crim. 23779

In re GREGORY MOLLER WARD
on Habeas Corpus.

A017266 1 Crim. 22517

In re GALE BERNELL BERRY
on Habeas Corpus.

(Filed April 27, 1983)

THE COURT:

The majority opinion heretofore filed on March 28, 1983, has been substantially modified. For convenience, the entire opinion has been retyped to reflect those changes and is attached to this order.

The petitions for rehearing are hereby denied.

RATTIGAN, J.
RATTIGAN, Acting P.J.

CERTIFIED FOR PUBLICATION
SEE CONCURRING OPINION
IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

No. A016358 (Sonoma Sup. Ct. No. 209-C)

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT WALTER TROMBETTA,
Defendant and Appellant.

No. A016374, (Sonoma Sup. Ct. No. 215-C)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL GENE COX, et al.,

Defendants and Appellants.

No. A017265, 1 Crim. 23779.

In re GREGORY MOLLER WARD
on Habeas Corpus.

No. A017266, 1 Crim. 22517.

In re GALE BERNELL BERRY
on Habeas Corpus.

(Filed April 27, 1983)

These cases arise, in diverse procedural settings, from misdemeanor prosecutions for driving under the influence of intoxicating liquor (formerly Veh. Code §§ 23101, subd. (a), or 23102, subd. (a); now §§ 23153, subd. (a), or 23152, subd. (a), respectively). The issue raised is whether intoxilyzer breath results are rendered inadmissible in a trial for driving under the influence of intoxicating liquor by virtue of the failure of law enforcement officials to preserve a retestable breath sample.

In each case the municipal court denied the defendant's common law motion to suppress the evidence ob-

tained from an intoxilyzer breath test. Each defendant then appealed to the superior court which affirmed the lower court order; the cases were then certified for transfer to this court. In the *Trombetta* and *Cox* groups of cases this court accepted transfer. It appears that *Trombetta* and its companion case have not proceeded to trial. The record does not indicate whether the cases in the *Cox* group have proceeded to trial; no judgment was entered in these cases.

An appeal may not be taken from a pretrial order of the municipal court. (Code Civ. Proc., § 904.2.) The correct procedure in *Trombetta* and *Cox* would therefore have been for the defendants to wait until a judgment was entered in the municipal court and then appeal that judgment. Because no appealable order was challenged in *Trombetta* or *Cox* those appeals should have been dismissed by the appellate department of the superior court. (*People v. Superior Court (Scott)* (1980) 112 Cal.App.3d 602, 606.)

In the *Ward* and *Berry* cases judgments of conviction were followed by superior court appeals; transfers to the Court of Appeal were whereupon those defendants petitioned the Supreme Court for writs of habeas corpus. The Supreme Court issued orders in *Ward* and *Berry* to show cause before this court why relief should not be granted.

Each defendant was arrested for driving under the influence of alcohol. (Formerly Veh. Code §§ 23101, subd. (a), or 23102, subd. (a); now §§ 23153, subd. (a), or 23152, subd. (a), respectively). Each was asked to select any one of three blood alcohol level tests (breath, blood, or

urine). Law enforcement officers urged the defendants to select the breath test and each did select that test. The breath tests were conducted on an Omicron Intoxilyzer. Each defendant's breath registered an alcohol level of at least 0.10. No defendant was told that a breath sample would be saved.

The Legislature has established a presumption that a driver whose blood alcohol level is less than 0.05 percent is not under the influence of an alcoholic beverage. If the blood alcohol level is between 0.05 percent and 0.10 percent, no presumption arises. (Veh. Code, § 23155, subd. (a).) However, another statute provides "It is unlawful for any person who has a 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle upon a highway or upon other than a highway in areas which are open to the general public. . . ." (Veh. Code, § 23152, subd. (b).) Thus, the statute establishes guilt where chemical blood alcohol tests prove that the percent of alcohol is 0.10 percent or more, without any showing of actual impairment.

Given the importance of accurate determination of blood alcohol levels, and the greater convenience of breath testing as opposed to testing of blood or urine, the Legislature has directed the State Department of Health Services to establish, by regulation, procedures to be used by law enforcement agencies in administering breath tests for the purposes of determining the concentrations of alcohol in a person's blood. (Health & Saf. Code, § 436.52.) These regulations are contained in title 17 of the California Administrative Code, sections 1220 et seq. Three of the breath testing devices which require discus-

sion had been approved by the Department of Health Services as of December 20, 1979: the intoxilyzer, the breathalyzer, and the intoximeter field crimper-indium tube encapsulation kit.

A brief description of the operation of the intoxilyzer follows: Prior to any test, the device is purged by pumping clean air through it until readings of 0.00 are obtained. The breath test requires a sample of "alveolar" (deep lung) air (Cal. Admin. Code, tit. 17, § 1219.3); to assure that such a sample is obtained, the subject is required to blow air into the intoxilyzer at a constant pressure for a period of several seconds. A breath sample is captured in the intoxilyzer's chamber and infrared light is used to sense the alcohol level. Two samples are taken, and the result of each is indicated on a printout card. The two tests must register within 0.02 of each other in order to be admissible in court. After each test, the chamber is purged with clean air and then checked for a reading of zero alcohol. (See *People v. Miller* (1975) 52 Cal.App.3d 666, 668-669.) The machine is calibrated weekly, and the calibration results, as well as a portion of the calibration samples, are available to the defendant.

The breathalyzer operates on a completely different principle. (See *People v. Hitch* (1974) 12 Cal.3d 641, 644.) To conduct a breathalyzer test, the breath sample is captured in a glass ampoule containing exactly three cubic centimeters of a chemical solution. If alcohol is present, it changes the translucency of the solution. The alcoholic content is then measured by shining a beam of light through the solution. The test ampoule and the test solution can then be retained for retesting by the defendant.

Finally, the operation of the intoximeter field crimper-indium tube encapsulation kit must be considered. This "kit" can be used in the field to collect a breath sample which is separate from the sample collected by the intoxilyzer. The device is independent from the breath testing devices and is in effect only a breath *collection* as opposed to a breath *testing* device. The subject blows into an indium tube which captures the breath sample. The indium tube is a soft metal device used to capture and preserve a breath specimen for later analysis. The tube originally is in a single piece but when the sample is blown into the tube, it can be crimped to hold the breath sample in three separate compartments. These containers can then be placed in a gas chromatograph (intoximeter) device which will test the sample for blood alcohol content. The gas chromatograph is an approved device for blood alcohol determination; the indium tube is approved for use with the gas chromatograph if the sample is tested within 14 days of collection. (Instruments Approved for Breath Alcohol Analysis, Dept. of Health, Dec. 20, 1979.)

Defendants contend that there are three grounds upon which this court should require suppression of the evidence obtained from the intoxilyzer tests: the duty of the prosecution to preserve evidence, equal protection, and requirements of informed consent. We deal only with the first ground.

The contention is that under *People v. Hitch, supra*, 12 Cal.3d 641, the failure of law enforcement personnel to capture and preserve a retestable breath sample violated due process and rendered the intoxilyzer results inadmissible. In *Hitch*, the Supreme Court held that a law

enforcement agency conducting a chemical test for alcohol has a duty to preserve and disclose all material evidence which the agency has gathered. The court held that a due process violation occurred when the defendant's test specimen and test solution from a breathalyzer test were discarded. The defendant's eventual attempts to utilize discovery to verify independently the alcohol content of the ampoule, to ascertain that exactly three centimeters of the solution had been used, and to examine the glass ampoule itself for any defects which would alter the alcohol reading were thus unfairly frustrated. (*Id.*, at pp. 649-650.)

The *Hitch* court, in considering the admissibility of "breathalyzer" results, determined initially that the results of the blood alcohol test "by their very nature constitute material evidence on the issue of guilt or innocence upon a charge of drunk driving." (*Id.*, 12 Cal.3d at p. 647.) The court held that the investigative agency involved in the test has a duty not only to disclose such material evidence but also to preserve it. Accordingly, the court stated that "where, as here, such evidence cannot be disclosed because of its intentional but nonmalicious destruction by the investigative officials, sanctions shall . . . be imposed for such nonpreservation and non-disclosure unless the prosecution can show that the governmental agencies involved have established, enforced and attempted in good faith to adhere to rigorous and systematic procedures designed to preserve the [evidence]. The prosecution shall bear the burden of demonstrating that such duty to preserve the [evidence] has been fulfilled." (*Id.*, at pp. 652-653.) If this burden is not met, the results of the test are to be excluded at

trial. Since the *Hitch* rule implements a federal due process standard, (*Id.*, at pp. 645, 646) it is unaffected by California Constitution, article 1, section 28, subdivision (d). (See *Brosnahan v. Brown* (1982) 32 Cal.3d 236.)

In the present cases, it is conceded that no effort was made to capture breath specimens for later testing by the defense. Defendants contend that the intoxilyzer evidence should therefore have been excluded from trial.

In denying many recent motions to exclude intoxilyzer results, many lower courts have relied on *People v. Miller*, *supra*, 52 Cal.App.3d 666. In *Miller*, the Court of Appeal examined "the question [of] whether the recent decision of the Supreme Court (*People v. Hitch*, 12 Cal.3d 641) should be extended to render inadmissible the results of all chemical tests of breath conducted by use of the 'Omieron Intoxilyzer.'" (*People v. Miller*, *supra*, 52 Cal.App.3d at p. 668.) The *Miller* court determined that "*Hitch* merely holds that evidence which the prosecution once possesses must be held. The test by intoxilyzer . . . may have 'gathered' evidence in the sense of placing the breath in the chamber, but it was not evidence of which the government could 'take possession.' The only element reducible to possession was the printout card, which has been preserved." (*Id.*, at pp. 669-670.)

We disagree fundamentally with the *Miller* characterization of what happens when a breath sample is taken. That is, in our view, such a taking is the collection of evidence within the *Hitch* rationale. The question then is whether the specimen may be exhausted in testing without taking available steps to obtain and preserve another specimen for retesting.

A similar situation confronted the Colorado Supreme Court in *Garcia v. Dist. Court, 21st Jud. Dist.* (Colo. 1979) 589 P.2d 924. Colorado, like California, uses urine, blood or breath tests for a determination of alcohol level, and samples of blood and urine "are customarily preserved for the use of the defense and to insure that the test is accurate." (At p. 926.) In further similarity to California, a presumption of driving under the influence arises from a certain level of alcohol in the blood. (*Ibid.*)

Two fact situations were before the *Garcia* court. In one, the breathalyzer tests and ampoules were destroyed in accordance with standard police procedures; in the other, the defendant was given a "Lucky Alco-Analyzer" breath test, which could not preserve a sample for testing. In both cases, the defendants' motions to suppress the results of the tests were denied.

Recognizing that in the first situation a sample of the defendant's breath "could have been preserved", and in the second other methods existed to preserve the defendant's breath, the court concluded: "The failure of the state to collect and preserve evidence, when those acts can be accomplished as a mere incident to a procedure routinely performed by state agents, is tantamount to suppression of that evidence." (At pp. 929-930.) "We hold, therefore, that in all cases where a defendant elects to submit to a breath test to determine his blood alcohol level, he must be given a separate sample of his breath at the time of the test or the alcoholic contents of his breath in a manner which will permit scientifically reliable independent testing by the defendant, if that test is to be used as evidence. [Citations.]" (At p. 930.)

We are persuaded that the reasoning of the Colorado court — paralleling the *Hitch* rationale — is sound and that the same result should prevail in California. Due process demands simply that where evidence is collected by the state, as it is with the intoxilyzer, or any other breath testing device, law enforcement agencies must establish and follow rigorous and systematic procedures to preserve the captured evidence or its equivalent for the use of the defendant. (*People v. Hitch, supra*, 12 Cal.3d at pp. 652-653.)

With the exception of the cases reviewed in this decision (i.e., A016358, A016374, A017265, A017266) this holding will apply prospectively only to tests performed after this decision has become final. Although we place primary reliance upon *People v. Hitch, supra*, 12 Cal.3d 641, it may reasonably be presumed that law enforcement activities in breath testing have been performed in good faith reliance upon *People v. Miller, supra*, 52 Cal.App.3d 666, which, as we have noted, reached a conclusion contrary to our holding today.

The Trombetta and Cox groups of appeals are dismissed; in the Ward and Berry proceedings, writs of habeas corpus will issue granting new trials at which the intoxilyzer evidence will be excluded.

Certified for Publication.

POCHE, J.

I concur:

RATTIGAN, Acting P.J.

People v. Trombetta, (Cox, Ward & Berry)
A016358, A016374, A017265, A107266

I concur fully in the judgment and write separately only to emphasize that by this decision we do not prescribe or recommend any particular devices or procedures but hold simply that those before us in these cases do not satisfy the due process requirements of *People v. Hitch* (1974) 12 Cal.3d 641. In each case, the arresting officer urged the defendant to choose the breath rather than the blood or urine test but failed to inform him that as a consequence of this selection no sample would be retained. In none did the officer advise the driver of his right to preservation of a breath sample and obtain from him a waiver of that right. The Arizona Supreme Court has held that such a procedure is constitutionally adequate. (*Baca v. Smith* (1979) 604 P.2d 617, 618-620). As no driver here gave a knowing and intelligent waiver of his right to preservation of evidence, that question is not reached here. Similarly, we do not consider here a situation in which police establish and diligently follow rigorous and systematic procedures for preservation of samples but circumstances beyond their control frustrate retention of a sample in a particular instance. As the majority opinion indicates, the core requirement of *Hitch* is establishment of and adherence to procedures which ensure fairness in the administration of field tests. The responsibility for designing those procedures lies with the Legislature and with state and local law enforcement agencies.

Christian, J.

IV

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SONOMA
DEPARTMENT NO. 3
BEFORE:
HONORABLE LAWRENCE G. ANTOLINI, JUDGE

No. 78402 TCR
78532 TCR
Charge: 23102a VC
23102a VC w/1 prior

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
-vs-
MELINDA BERTRAM and
ALBERT TROMBETTA,
Defendants.

**REPORTER'S TRANSCRIPT
OF
HITCH MOTION**

April 30, 1981

Reported by:
BRENDA B. KRAEGER
C.S.R. No. 1896

APPEARANCES

For the People: **MARK TANSIL, Esquire**
 Deputy District Attorney
 County of Sonoma

For the Defendants: JOHN F. DeMEO, Esquire
Attorney at Law
1022 Mendocino Avenue
Santa Rosa, California 95401

(page 4) MR. TANSIL: Basically, we're the responding party. The only thing I would bring up is that I believe both sides will stipulate that the Court's ruling on the constitutional issues that are being raised by the moving party would bind both sides at trial should this proceed to trial, both cases (page 5) proceed to trial.

THE COURT: This is stipulated then to be in essence the trial motion?

MR. DE MEO: Yes. In that regard, your Honor, there will be other stipulations offered shortly.

THE COURT: Very well. That stipulation is acceptable to the Court, and gentlemen, if there's any other stipulation—

* * *

(page 6) THE COURT: If I could stop you just for a moment. That brings up a point that does concern me. As far as the vehicle, and I would hope we could get a stipulation as to this—I'm quite concerned that a 1538.5 may not well be a proper manner to bring this before the Court. Is there a stipulation as to that? I would deem it in essence stipulated when this is deemed to be the pre-trial motion, it would be a proper vehicle.

MR. TRANSIL: The People in indicating that we are willing to stipulate to the ruling on the constitutional is-

sues being binding on the trial court, we would agree a 1538.5 motion as was argued in our brief is not an appropriate vehicle. This is not a search and seizure issue per se, but we are willing for convenience to the trial court to stipulate that your ruling now will bind both of us at trial on both of these cases on the constitutional issues that have been raised by Mr. De Meo in his brief.

THE COURT: Very well. Is that stipulation acceptable?

MR. DE MEO: Certainly in that regard *People versus Scott*, which we did cite clearly indicates that there is a common law pre-trial motion to suppress, so I think it's probably moot.

(page 7) THE COURT: It's the Court's feeling, just to share this with you, that 1538 is not the proper vehicle but with that stipulation, because I really want to get by this quickly. It's a moot point, so, very well.

* * *

(page 33) MR. DE MEO: I'll staple the whole package together. That would be easier.

Finally, in the way of an offer to stipulate which was filed with our notice of motion some time ago, it is my understanding that there will be some affirmative responses to our offer to stipulate. Namely, that in both cases it would be stipulated that both defendants were administered breath tests indicated in this offer to stipulate, namely, January 31, 1981, as to Mr. Trombetta, and February 1, 1981, as to Mrs. Bertram; in that the instru-

ment used was the Intoxilyzer machine model 4011 AW, and that this occurred at the Sonoma County jail, Santa Rosa, California. That's (page 34) stipulated to, is it not?

MR. TANSIL: That's correct.

MR. DE MEO: It is my further understanding that in both cases it would be stipulated that at no time prior to or after the Intoxilyzer tests were administered to either of these defendants did any law enforcement or peace officer advise either of them verbally or in writing that there would be no sample of his or her breath preserved for retesting or for any purpose.

MR. TANSIL: That's also stipulated to.

MR. DE MEO: In other words, that there was no warning before or after to either defendant. It's my further understanding then in both cases it would be stipulated that at the time of the collection of the sample on the Intoxilyzer, that there was and is and has been available a device which is approved by the Department of Health in the State of California for the collection of a breath sample for later testing. And in regard to that stipulation, it would also be stipulated that this does not foreclose us from calling our expert to expand on that particular point. Is that also correct?

MR. TANSIL: Well, that may have to be modified just a bit. I believe he said at the time that breath was

collected on the Intoxilyzer. I'm not sure what Mr. De Meo means by "collection" now that he's been arguing some. I would say at the time the Intoxilyzer machine was used at the time on Bertram and Trombetta.

THE COURT: The Court's not clear and it's a question (page 35) I'm quite concerned about. The use available. Does that mean — you mean in the State of California or do you mean that if the defendant had requested that machine to be used rather than the — whatever, the 4011 AW Intoxilyzer, that it could have been used at that time? What is meant by "available"?

MR. DE MEO: Well, by available I don't think that Mr. Tansil means to imply that they had one sitting in there. I don't know whether they did or not, but they're in the County of Sonoma, City of Santa Rosa, State of California, all over the place. Whether there was one right there at that moment, I'm not prepared to say whether there was or wasn't, but I don't think you meant to imply there was.

MR. TANSIL: No. I think the availability comment would be were the State required to take a separate breath sample for restesting for the defendant that there is a device, the Indium Tube, which goes under that longer name, which could be obtained by the State for use in the county. Not that it was necessarily sitting right in the room where the Intoxilyzer machine was being used, but in a technical sense the State could get that off the market and use it were it required to do so by the constitution.

THE COURT: My understanding — this is an aside, although it's obvious, but since it's on my mind, I want to speak it. In the *Kansas case* cited by the People, was

there not — was it not stated that there was a separate test available for her use at that time if she so requested it or am I —

MR. DE MEO: In the *Kansas case* — no, your Honor, in (page 36) *Kansas* they used the Intoximeter Field Crimper Indium Tube Encapsulation Kit, and what they do, it makes three samples. But in *Kansas*, a rather parochial, conservative state, what they do is they use all three. The People uses all three of the tests, so there's none left unless they run another three, but they do it there. The Kansas Highway Patrol uses that system and also that — interesting you mentioned that case. It points out that they have no duty by statute in Kansas to advise the defendant that he has a choice or what the consequences are of a refusal. The case points that out, which is quite interesting.

MR. TANSIL: If we could get back to the stipulation.

THE COURT: Mr. Tansil, I'll run the court and you just make objections and we'll know where we are.

MR. DE MEO: I guess we were at that stipulation concerning that there was an approved available device for the collection and/or whatever you want to refer to it as taking of a breath sample for later testing at this particular time and there had been such—

MR. TANSIL: That's correct, your Honor. Not necessarily available in the room where the Intoxilyzer machine was being used, but on the market and available to the State if it were required to use that as a second test.

THE COURT: With that clarification, that stipulation will be accepted.

MR. DE MEO: Thank you, your Honor. It's my understanding also, in both cases it would be stipulated there was no breath sample collected for subsequent, later analysis on (page 37) either defendant in these cases. Is that correct?

MR. TANSIL: That would be correct. There was no use of the Indium Tube, which I believe would be the only approved device for collecting a sample for later retesting.

THE COURT: That will also be accepted then by the Court.

MR. DE MEO: Yes, your Honor. And it's my further understanding that it would be stipulated to — I think we've already covered this — that the ruling of the Court subject to all proper appellate review would be binding on the People and these defendants at the time of trial.

MR. TANSIL: So stipulate, your Honor.

THE COURT: That stipulation, also, then will be accepted by the Court.

* * *

(page 38) DONALD MURRAY, produced as a witness on behalf of the Defendants, having been first duly and regularly sworn by the Clerk to testify the truth, the whole truth and nothing but the truth, testified as follows, to wit:

Direct Examination

BY MR. DE MEO:

Q. Good morning, Mr. Murray.

A. How do you do, sir.

Q. Would you please state your full name and your address?

A. Donald D. Murray, 1011 Ignacio Valley Road, Walnut Creek, California.

Q. And Mr. Murray, would you relate to the Court what your occupation is?

A. Present time I'm a forensic consultant in alcohol cases and instrumentation.

Q. Would you tell us what type of instrumentation you're referring to?

A. Breath equipment to test for alcohol.

Q. Are you licensed by the State of California as a clinical laboratory technologist?

A. Yes, sir, I am.

Q. In that regard, are you required to take and pass an (page 39) examination administered by the State of California as a prerequisite to licensing as such?

A. Yes, I did in 1948.

Q. Did you take and pass that test?

A. Yes, sir.

Q. Can you tell us generally what you are authorized and qualified to do as a licensed clinical laboratory technologist?

A. Clinical laboratory technologist is one who would do tests of body fluids and vapors and tissues to detect the absence or presence of disease or health.

Q. All right. Have you ever been registered as a medical technologist?

A. Yes. I'm registered in 1948 with the American Medical Technologist National Registry.

Q. All right. And what is required, if anything, as a prerequisite to recognition as a member of the American Medical Technologists?

A. Well, you have to be proficient in the field. A certain number of years of experience in clinical laboratory work and then pass a written examination, written and oral in some cases.

Q. Did you actually take and pass an examination to be certified?

A. Yes, I did.

Q. What is the purpose and function of the American Medical Technologists? In other words, what are you qualified to do as such?

A. Well, again this would be — National Registry is used in (page 40) many states all over the United States. Back when I started, they didn't have license laws, so if one were registered nationally, he could function as a clinical laboratory technologist in hospitals, clinics, wherever, doing the same thing that I formerly stated, testing for the presence or absence of disease with body fluids and vapors.

Q. All right. And is there an American society of medical technologists?

A. Yes, there is.

Q. Did you ever belong to that?

A. Yes.

Q. What is its purpose?

A. It's similar. They're all about the same.

Q. Mr. Murray, have you ever been certified by the State of California as a forensic alcohol analyst?

A. Yes, I was.

Q. When, sir?

A. Let me check. Here in 1971.

Q. And were you required to take and pass an examination to qualify to be certified by the State?

A. Yes.

Q. And did you take and pass such a test?

A. Yes, I did.

Q. Can you tell us what certification as a forensic alcohol analyst qualified you to do?

A. One who is certified as a forensic alcohol analyst could work in a forensic alcohol laboratory performing any of the tests there that are used in court on either blood, breath or (page 41) urine specimens.

Q. Are those the three types of fluids or vapors that you were qualified and certified to collect for forensic analysis?

A. That's correct.

Q. As you have indicated, you must be associated with a State certified forensic laboratory in connection

with your capacity as a forensic alcohol analyst; is that correct?

A. Yes, sir, that's true.

Q. And what lab were you associated with in that regard?

A. Ultrachem Laboratory in Walnut Creek.

Q. For what period of time were you associated in that capacity with them?

A. Well, from the time in 1971 until March 16th of 1980 when I terminated there.

Q. And at that time did the Department of Justice then open their own laboratory in Contra Costa County?

A. It wasn't the Department of Justice, sir. It was the Contra Costa County Criminalistic Laboratory that set up and took over the work we were doing.

Q. I see. During the time that you were associated with Ultrachem, what, if any, official associate or capacity did Ultrachem have with the County of Contra Costa relative to forensic alcohol analysis?

MR. TANSIL: Objection; irrelevant.

THE COURT: Overruled.

THE WITNESS: During the time I was there and even long prior to that the — the laboratory, Ultrachem, contracted to do the testing for the county, the type that the crime lab (page 42) is doing now in all of the county except the Richmond area.

Q. Did that testing include the blood, breath and urine collections and analysis for law enforcement in the

Contra Costa County other than that one area you have indicated?

A. Yes, it did.

Q. You have indicated that Ultrachem no longer functioned in that capacity after March of 1980 by virtue of the county taking over a forensic lab of its own; is that correct?

A. Yes, that's right.

Q. And did you function as a forensic alcohol analyst for the Ultrachem Lab in 1971 through 1980 in March?

A. That's right. I did.

Q. Can you give us an approximation of how many samples of blood you personally collected from suspects charged while driving under the influence or other alcohol related crimes in your capacity at Ultrachem as a forensic alcohol analyst?

A. Yes, sir. At the time I left, I had tested, personally tested 14,371 individuals over about nine years and I would estimate that about half of those were blood and the other half were breath or breath and urine or in some cases all three. Some years back we used to give a subject — we do all three tests if he wanted it at the same setting.

Q. With regard to the breath samples, can you give us an approximation of about how many of those you personally collected from suspects charged with driving under the influence of alcohol or alcohol related crimes?

A. Well, since about half of the people I tested were breath and this is an estimation, but it's quite — pretty close (page 43) then I would say that I have tested over 14,000 breath tests since I did two tests on each individual during that time.

Q. Can you tell us, Mr. Murray, what types of equipment you became familiar with by study or experience in the collecting and testing for breath alcohol analysis?

A. Well, I'm familiar with the machines that are approved by the State. That includes the Intoxilyzer. This is the infra-red device that's used and the Intoximeter. It's the Gas chromatograph instrument that's used and the Breathalyzer and also the Indium Tube crimping device which is an accessory or it can be used independently, either one, but it's an accessory to the Intoximeter.

* * *

(page 58) Q. Now, Mr. Murray, have you ever qualified as an expert in court on the subject of forensic alcohol analysis and instrumentation pertaining to alcohol analysis?

A. In courts!

Q. Yes, sir.

A. Yes. I've qualified 465 times, I believe, now in the last nine years.

Q. In what counties?

A. Santa Clara County, Alameda County, San Mateo County, Contra Costa County, and I'm not sure about

Sacramento. I went up there. I don't think I got on the stand though, a couple of times.

Q. In both Muni and Superior Courts?

A. Yes, sir.

Q. And the total number of times you've testified as an expert on this subject or how many, roughly?

A. As an expert, 465 times so far.

(page 59) Q. And how many times were you called as a witness by and for prosecution in those number of occasions?

A. All of them except about 15, I believe.

* * *

Q. Mr. Murray, I'd like to direct your attention to the Department of Health approvals of instruments, and in that regard, to your knowledge, does the State of California require that before any instruments purporting to be capable for breath alcohol analysis be approved in advance before it can be used as such?

A. Yes. The State has this requirement, right.

Q. You're familiar with that list, are you not?

A. Yes, sir.

Q. And with regard to those particular lists, are the following instruments approved for use in California for breath alcohol analysis of the Intoximeter Field Crimper Indium Tube Encapsulation kit, is that one that's approved?

A. The kit is approved and so is the crimper, yes.

Q. For how long?

(page 60) A. How long has it been approved?

Q. Yes.

A. Since 1973.

Q. And the primary attribute of that particular device is what?

A. It has the capacity to collect and preserve a breath sample for later analysis.

Q. Can it be collected in the field with this instrument?

A. Yes, it can. The instrument is designed where you can plug it in and take it out in your car. An officer, for instance, could collect out in the field with it.

Q. All right. Can it be used in a stationary location in a room?

A. We use the — hundreds of times, I would say. Maybe a thousand, but in that situation, yes.

Q. Is it necessary to plug the crimper into an outlet? If so, what kind of an outlet?

A. Yes. Wherever you're at, you have to keep it warm, so if you're in a car, you plug it into your dashboard and if you're in a room, into 110.

Q. Is the gas chromatograph Intoximeter Mark II model and Mark IV model also approved by the State of California?

A. Yes, they are.

Q. And how long have those instruments been approved by the State?

A. Since 1971.

Q. We've talked about the gas chromatograph Intoximeter capacity for being specific for ethanol. Now, on another (page 61) subject can it be used in conjunction with any other instrument? This is the GC Intoximeter.

A. Well, I don't quite understand that question.

Q. We first talked about the Intoximeter Field Crimper Encapsulation kit.

A. Yes.

Q. What do you do with that sample when you get a sample from the Field Crimper Encapsulation kit? Is there another instrument that can test that preserved sample?

A. Yes. If you're going to run the kit, the little Indium Tube kit, then you would most likely use the Intoximeter. It's designed to do that test. And if you're in a forensic lab and you were using this in a forensic program, you would be required by State law to use that Intoximeter to do the test. However, the defense doesn't have that kind of requirement. He can test it any way he wants to.

Q. But as far as at least the People are concerned, the GC Intoximeter is approved for use in testing what is collected by the Field Crimper Encapsulation kit?

A. Yes, it is, sir.

* * *

(page 62) Q. The Intoxilyzer machine then without further modification does not preserve a breath sample for later or subsequent testing, does it?

A. No. I don't know anybody that's doing that.

Q. All right. Now, they only collect them for immediate analysis and then the machine dissipates the sample taken into (page 63) the room, does it not?

* * *

Q. Now, to your knowledge and from your study and review of the approval sheets that the State sends out, the finding which machines are approved for use for forensic alcohol analysis, do those approval sheets including the one on the Intoxilyzer machine in this case speak in terms of collecting, the word collecting breath samples for analysis?

A. That's right. They use the term "collect."

Q. Now, I'd like to direct your attention at this time to the subject of the Indium Crimper in that device. Now, we've talked about the fact that there is such a device; that it's been approved by the State since 1973. I'd like to ask you is it and has it been available for purchase in the State of California since the time it was approved in 1973?

A. Yes, it is.

Q. Do you know from whom it is obtainable and has been obtainable for that period of time?

A. Yes, Cal-detect Corporation in Richmond manufactures and distributes that.

Q. Are you aware of the present cost of the crimper device?

A. I believe they're around \$200 right now.

(page 64) Q. Can that device be used over and over and over again?

A. Yes.

Q. In other words, you don't use that device once and throw it away, do you?

A. No, sir.

Q. Now, that particular device functions in conjunction with a kit, does it not?

A. That's correct.

Q. And to your knowledge, are these kits available and have they been available for purchase since the time the crimper was approved in California?

A. Yes. They're readily available.

Q. And do you know what the approximate cost is for each capsulation kit that is used in conjunction with the crimper?

A. Yes. If you buy them singly, the price has just gone up to \$13.90. I just bought two of them.

Q. That would be for each kit; is that right?

A. At the single price, yes. If you bought a thousand, you might get a little reduction, but the latest price is \$13.90 for each test kit.

Q. And routinely, would you use one of those kits on each suspected individual?

A. Yes. If you were saving, you would use one kit to save three samples.

Q. All right. To your knowledge, is there any scarcity of these kits?

A. There's no scarcity at all.

Q. By the way, in this encapsulation kit, what is the metal (page 65) that's used for purpose of housing the breath sample?

A. Indium.

Q. And is Indium recyclable?

A. Yes.

Q. In other words, after you're through with it, can you turn it back to the company and they can remold it?

A. Right.

MR. TANSIL: Objection; irrelevant.

THE COURT: Overruled.

THE WITNESS: Yes. Yes, you can. They pay you for the Indium itself and they re-use it.

BY MR. DE MEO:

Q. Now, did you at my request bring with you an Intoximeter Field Crimper and a kit?

A. Yes, sir.

Q. And in your opinion would it be helpful to the Court and counsel to demonstrate how that instrument functions?

A. It's very simple and I think it would be.

Q. All right. Let me ask you this before you get into it. Have you taught the use of this device by law enforcement people?

A. Yes. Our lab has taught and I have assisted in that.

THE COURT: May I ask this: At whose request did you do that teaching, the use of the device, what agency?

THE WITNESS: We had set up Concord Police Department with their own instrument and our lab was the forensic lab for them for some years and they were using the Intoximeter like we were and they did the same thing we did. They (page 66) collected these samples so it's Mr. Stagley set up the—taught them mostly all at one time on weekends and when he's on vacation I had to take over there. Every now and then we get an officer and I'd have to show him how to do it.

MR. TANSIL: Your Honor, I would object at this point to relevance. This is not a hearing or trial and some factual issue, although it is a legal issue as to whether the State has to use a device like this, I don't think any general description of the device itself is going to benefit the Court. The issue is whether the device has to be used, period, as a legal matter.

THE COURT: Mr. De Meo!

MR. DE MEO: Your Honor, I would respond to that by saying we're talking about the constitutional rights of an individual accused of a crime and I think when the Court sees and the record indicates how simple it is for this device to be utilized and the ease with which it can be utilized and the minimal cost that it's certainly relevant on the question.

THE COURT: Let me ask you this, Mr. Tansil: Will the People stipulate what was just stated; that is, the People stipulate the crimping device and the kit together with the actual crimping device are accessible? They are very simple to use and so forth. Is there any argument on that?

MR. TANSIL: I have no argument as long as we're talking about using the crimping device as Mr. Curry did in the declaration that's already come in separate and apart from the intoxilyzer machine. To that extent, I would stipulate (page 67) it's on the market. It sells for prices as indicated and could be obtained by the State, if required to do so.

THE COURT: Now, there is one comment you made I want to comment on. You said separate from the Intoxilyzer machine that's presently in use. It's the Court's understanding that the crimping device is separate from the Intoxilyzer, completely different unit. It can be used quite easily, but it must be purchased. In other words, the intoxilyzers as they presently exist there is not a kit that could be put onto the Intoxilyzer. In other words, to act as a crimping device; in other words, for \$13 just already using the existing Intoxilyzer. At least that's my understanding.

MR. DE MEO: That's correct. In fact, we were going to go into that specific subject at some point here. That's right. The Indium Crimper and this Encapsulation kit is not designed to be used with the Intoxilyzer, but it is designed to be used with the GC Intoximeter Mark II or Mark IV machine.

MR. TANSIL: I'm in full agreement that would be a process that could be followed if required by law.

MR. DE MEO: Also, I think we need a stipulation that this Intoximeter Field Crimper may be utilized by itself in collection of a breath sample. It can be in the field. It can be at the county jail, the police department, wherever you might choose to collect a sample. That kit and that machinery, that instrument may be used anywhere in and of itself and is so authorized to be used.

THE COURT: Once again I see no problem.

MR. TANSIL: No objection as long as it's understood (page 68) that crimping device doesn't do the testing. All it does is capture the breath sample which will be tested on another device.

THE COURT: The crimping device is what actually is used for testing and the kit is what preserves the three samples, if I'm keeping up with the testimony.

MR. DE MEO: That's correct.

THE COURT: You stipulate then to that?

MR. TANSIL: Yes, your Honor. I believe I would.

* * *

(page 69) THE COURT: The Court's clear it appears to be by stipulation that there is an alternative method of testing available to the State of California that is—would appear to be financially feasible to use and also is in essence from a realistic standpoint available. I believe those would be the Points you'd be trying to make, would they not?

MR. DE MEO: Yes, your Honor.

THE COURT: And the People stipulate to this; is that correct, Mr. Tansil? Did you hear what I said or were you —

MR. TANSIL: I'm sorry. I missed that. Would you read that?

(Record read.)

MR. TANSIL: Yes, your Honor. I think that is correct.

* * *

Q. Mr. Murray, I'd like to now direct your attention to the time within which the collected samples may be accurately tested in using this Intoximeter Field Crimper device. All (page 70) right?

A. Yes, sir.

* * *

(page 71) Q. Have you made such a study as to how long a period of time must pass and the integrity of the sample would still be good? Have you made such a study?

A. Right. I've studied the literature on it, talked to many people.

Q. And in your opinion, Mr. Murray, with regard to the literature that you've studied, do you regard them in your opinion as authoritative in the field of science?

A. That's right.

Q. And what were some of the studies and sources that you referred to concerning the subject of the integrity of the sample and the timing of the test?

A. One of the studies that I considered quite important is a late study in 1978 by the Canadian Royal Mounted Police. (page 72) Mr. Comeau, who is their chief forensic specialist up there, has written up that the tubes last up to 90 days with no trouble at all. They did a lot of work on that. And I have a copy of that here, if you want to see it.

Q. Any other tests? Any other studies that you —

A. We have sent them off from our own lab and we don't have any problem even up to a year. I don't know of any studies that go beyond 90 days, actually, where somebody studied this problem to determine that, but there are plenty of tests that we have sent off where the breath would relate to a blood that was taken at the same time up to a year.

Q. In other words, you would have a test study, an actual blood to compare with what the breath was by later analysis and they would correlate favorably and accurately; is that right?

A. Yes. We used to have quite a few like that where we do have blood, but we also in many cases had a breath test itself and then a sample was saved where the correlation was good after a year's time or up to—generally up to a year in most of these studies. There are very few people that test them after a year. There have been some rare cases and no one I know wants to study a thing that doesn't matter.

Q. Now, Mr. Murray, what is your opinion after studying these investigations and in your own experience based on reasonable scientific probability as to the period of time that these samples of breath collected by the device we're talking about, the crimping device and kit, what period they would retain their integrity for breath alcohol analysis?

(page 73) A. I'm quite sure that we could count on them for 90 days and probably up to a year.

* * *

Q. Would you tell us — well, actually, I guess that document that's in evidence on the approval says no more than 14 days shall elapse between the time a sample is captured by the Intoximeter Field Crimper Indium Tube Encapsulation kit and the time that sample is analyzed in gas chromatographic Intoximeter Mark II or Mark IV. You're familiar with that statement?

A. Yes.

Q. Would you explain to the Court how this 14-day requirement has been interpreted by the forensic alcohol supervisors, the labs and the analysts?

A. Well, the people I know interpret it to mean that if you're going to capture a breath like that, you have to test it before 14 days. In other words, you don't leave it in the trunk of your car if you happen to be up in the mountains someplace, an officer capturing a breath and bring it in three weeks later. That's what it means. It means you have to test it. This is acknowledged in forensic testing when you're testing for the police before 14 days elapsed. It has nothing to do with defense testing.

* * *

(page 74) Q. We were talking about temperature. Does it make any (page 75) difference to the integrity of the later testing as to what temperature or where this particular indium tube is stored in the meantime?

A. The tests that I've referred to, for one, they did test under refrigeration and at high temperature and it didn't seem to make any difference.

* * *

Q. Let me ask it again and don't answer it until Mr. Tansil objects.

Is the gas chromatograph Intoximeter the only instrument approved in the State which is specific for ethanol and not other substances?

* * *

(page 77) Q. Mr. Murray, I don't know whether you have the question.

A. I remember this one.

Q. All right.

A. Yes, it's the only instrument that I know of that is specific for ethanol.

Q. And that particular gas chromatograph instrument is manufactured right here in California you said?

A. Yes, it is.

Q. And do you know whether any forensic lab has one of these instruments in this particular County of Sonoma?

A. Yes. Jerry Curry's lab over here has had one for many years. Still has one here in this county.

Q. You're familiar with the Central Pathology Lab?

A. That's right. Have known them for years.

Q. To your knowledge, do they have qualified people there to operate and analyze breath tests on their gas chromatograph Intoximeter?

A. Right. Mr. Claus, who was over there who is the fellow that I trained up in Eureka when he first came to California. I know him quite well. He's well qualified in this field. So is Mr. Curry. I don't know who else he might have now.

* * *

(page 79) Q. Now, Mr. Murray, regarding all of these instruments we've talked about that collect and analyze breath samples for alcohol content, in your opinion are any of these instruments that the State has approved for breath alcohol analysis perfect and infallible?

A. None of them are.

Q. Do you have an opinion as what the most reliable test there is for alcohol analysis of an individual? In other words, of the three, the blood, breath or urine.

A. Yes. The most reliable will be blood tests that were measured on a gas chromatograph device.

* * *

Q. Mr. Murray, you told us that you have conducted some experiments with the Intoxilyzer machine. What was the purpose for which you conducted those experiments? What was it you were trying to determine or not determine?

A. Well, just demonstrating — I don't know which experiments you mean now. You mean recent experiments?

(page 80) Q. For specificity of the machine.

A. Going back to when Dr. Shear and I evaluated it some years ago — which are you referring to or do you want me to —

Q. I just want you to encapsulate for us, first, the purpose for which you did these tests and what your findings were.

A. Okay. We were testing specificity. In other words, we wanted to find out if — how specific it was. We knew that theoretically it's not specific for ethanol. The manufacturer admits that. What we wanted to see with our own eyes — but we wanted to see with our own eyes and we wanted to see if we took six common solvents that are found in foods, in the body or in the laboratory and run them through there, would they — would the instrument react, and it did.

Q. When you say "would it react," would you be more specific about that?

A. Well, if you run, for instance — it will react to ethanol. It's got the carbon hydrogen functional group at 3.39 wave lengths will react on this machine. You get a reading with ethanol. It will also react with acetone at that same wave length. It will also react with butane, gas from your lighter. It reacts with isopropyl alcohol. It reacts with the ingredients in gasoline, heptane and octane. It reacts with methanol and there are — these are some that I ran through, if you're talking about a quick

experiment. I've run others, but these are paramount that I recall.

Q. All right. For example, if I'm following you, if you had a large amount of acetone in your breath or if you had ingested — inhaled butane from a leaking cigarette lighter (page 81) and blew into that, you would get a reaction on the machine and would read out a level; is that right?

A. Yes. It would all read out as alcohol on that particular machine.

Q. It wouldn't, say, wait a minute, this is part acetone and part gasoline and part butane and only this much alcohol; is that right?

A. That's the problem, right. It doesn't do that. It calls everything alcohol, if you're going to say that's what you're measuring with it.

Q. Now, if we were to assume that an individual had a reading on the Intoxilyzer which was in excess of .10 and that a substantial contribution to that read-out above .10 was of heptane fumes on the clothing or a leaking lighter or someone who had a lot of acetone on their breath, that particular Intoxilyzer machine wouldn't tell you what was what; would it?

A. No, it wouldn't.

Q. Now, if we had a separate substantially similar breath collected by this Intoximeter Field Crimper and we ran that test with the same substances in it that was run on the Intoxilyzer through the gas chromatograph, what would the gas chromatograph do that the Intoxilyzer couldn't do?

A. It would give a true reading of what alcohol may have been in that sample of breath. It would also, and if you wish, tell you which contaminant may or may not be present.

Q. In other words, it would break out on the gas chromatograph how much, what quantity of alcohol it was as opposed (page 82) to all of these other things that may have distorted the Intoxilyzer; is that correct?

A. Right.

Q. Now, Mr. Murray, based on the present state of the art, or let's say the science, is it scientifically possible to collect and preserve a breath sample from a suspect by use of the omnicon Intoxilyzers, the ones they're using here?

A. Yes. It would be very simple to do that, if we can get them to do it.

Q. Can you explain how that could be done?

A. Well, just like the machine I have has a little port there so you can do this. And the reason it has a port — it's on the side. There's a little port where you can bring the exhaust tube out.

Q. What machine are we talking about?

A. I'm talking about the 4011a model that we recently bought from Dr. Harlow. This is set up the same way they use in Colorado. You just take a little silica gel tube like this and then when you get your second test, the breath, instead of purging it into the room, you remove this and put that into the tube and then run that 600 cc through the silica gel. And that will preserve whatever vapors are in there, whether it's alcohol, acetone, any va-

por. This is a very well accepted method of preserving vapors, collecting them. That is, is collects them.

Q. How long has that method been around, the silica gel method of collecting, years?

A. I don't know how long. Many, many years. We use it in (page 83) refrigerators. This type of tube is used to get vapors out of the room in the refrigerators. That's used in the column. Silica gel has been around a long time. It's a well accepted technique for capturing vapors, gases.

Q. To your knowledge, is that technique used with the Intoxilyzer in the State of Colorado to preserve samples of breath?

A. Yes. That's what they use over there by law.

Q. Is that an expensive device you have shown us?

A. I don't know what they're getting for them. They ought not to get over 50 cents, I would think. Silica gel is very cheap. The State could make them up themselves. You don't have to buy them from anybody. They could make them up.

Q. Now, that particular method that you've just explained with silica gel and the modification of the Intoxilyzer, is that approved by the State of California, Department of Health, at this time for forensic alcohol analysis?

A. No. I don't know — no, it's not approved here yet.

Q. Is it approved in Colorado?

A. Yes, it is.

Q. In your opinion, Mr. Murray, again based upon your knowledge and experience in this field, is the silica gel ampul adaptation to the Intoxilyzer for collection of breath samples for later analysis scientifically reliable?

A. Yes, it is.

Q. And do you believe that if it were proposed to the State of California that it would meet the standards that the State has set forth?

(page 84) A. I don't see why not. It's more reliable than the Intoxilyzer itself is, so I don't see why you'd have any trouble getting this put in so we could recheck those cases that were — was in dispute.

Q. Would that particular collection device, the silica gel, also be tested on a gas chromatograph type instrument?

A. That's another nice feature about it. You can use any — wet chemical techniques or you can test this on gas chromatograph. You can test it on a large reel infrared one does a fingerprint analysis on, not a breath machine but an expensive fingerprint machine. You could test it on gas chromatograph with a mass spectrophotometer. You could pick up traces of solvents for solvent poisoning that — when they have been in a person for up to 300 days later by the use of this technique right here.

* * *

(page 106) Q. In your opinion, if law enforcement had an Intoxilyzer machine and an Indium Crimper device and kit and captured a sample with the Indium Crimper within a few minutes after the testing on the Intoxi-

lyzer, would that Indium Crimper have (page 107) a valid sample for comparing against the Intoxilyzer?

A. Yes.

MR. TANSIL: Objection. Beyond the scope of cross-examination.

THE COURT: No. Overruled.

THE WITNESS: Yes, it would be valid and it's a common—very well accepted technique, which sometimes I have to take as high as four breaths on a device to get a proper breath on that subject just on the regular test without saving a breath.

* * *

(page 109) Q. Mr. Murray, do you need 600 cc's of a breath sample for the Intoximeter Field Crimping device to get a valid breath alcohol test?

A. On the crimping device?

Q. Yes.

A. No, sir, you do not. You only need about a quarter of a cc.

* * *

(Page 116) EUGENE PERSON, called as a witness on behalf of the People, having been previously sworn, testified as follows, to wit:

Direct Examination

BY MR. TANSIL:

Q. What is your current occupation?

A. I'm a criminalist employed by the State Department of Justice, working at the Santa Rosa Laboratory.

Q. How long have you worked at the Department of Justice?

A. I have been with the Department of Justice approximately 11 years, perhaps 12. I have been at the laboratory here since it opened in 1975.

Q. In your work with the Department of Justice, have you been certified as a forensic alcohol analyst?

A. I'm certified as a forensic alcohol supervisor.

* * *

(page 126) Q. Mr. Person, from what you have told me, this—the Intoxilyzer machine does not purge itself without the air pump use, does it?

A. It would over a considerable period of time, but not within the immediate time frame of an analysis.

Q. You haven't done any tests to determine how long it takes for the Intoxilyzer chamber to purge itself without the assistance of the air pump, have you, sir?

A. No, sir. I just know it's more than a ten, fifteen, (page 127) twenty minute period.

Q. Just ten, fifteen?

A. I say it's longer.

Q. But you wouldn't know whether it was an hour, five hours or a day, would you?

A. No, sir, I wouldn't.

* * *

(page 128) Q. All right. So this pump is designed to kick enough clean air through there to clear out all of the contaminated air from any suspect or from a simulator solution; is that right?

A. That's correct, yes.

Q. Because you wouldn't want to take another test if there was some contaminated vapor in there that was other than clear or air blank; is that right?

A. Well, you couldn't get an accurate test.

Q. That's right. Now, Mr. Person, there is no law in the State of California and no regulation in the State of California that would prohibit a police agency from having an (page 129) Intoximeter Field Crimper Indium Tube Encapsulation kit available at the police station to collect a separate sample before or following any test run on the Intoxilyzer; isn't that correct?

A. Well, there's no law that I know of that says that any of the approved instruments could not be kept at one location.

Q. In other words, you might have all three of them there and use all three!

A. There's no law that says you can't as far as I'm aware.

Q. You're aware that the Intoximeter Field Crimper can be utilized separate and apart from the Intoxilyzer machine to collect a breath, are you not?

A. That's the only way it can properly be used.

Q. Now, Mr. Person, if you were to administer as an operator of Intoxilyzer 4011 AW machine to test on a

suspect and you went through all the procedure on the Intoxilyzer to do that and then you collected another sample using the Intoximeter Field Crimper within a few minutes following the test on the Intoxilyzer, you would expect, would you not, that the test collected by the Field Crimper would be a valid sample and would co-relate in qualitative integrity for testing as against the Intoxilyzer test, would you not?

A. Well, since the procedure you speak of, the Indium Tube Encapsulation kit or whatever, since it has been approved by the Department of Health who did run tests on it before approval for breath testing, I would have no reason to suspect that any sample taken according to directions with that particular method would not be valid as much as one (page 130) taken by another method.

Q. That's what I was driving at. And if it was taken within a few minutes following the Intoxilyzer test, you would regard that as a valid sample for checking against the Intoxilyzer, would you not?

A. I would see no reason to have a check.

Q. Well, regardless of whether you would feel that there was a reason to have a check or not have a check, such a sample collected by the Crimper in your opinion would be a valid sample to test against the Intoxilyzer, would it not?

MR. TANSIL: Objection; argumentative.

THE COURT: Overruled.

THE WITNESS: I would expect the two to agree, but I'm not sure who I'd say was checking who.

BY MR. DE MEO:

Q. But you'd expect the two to agree?

A. I would expect it, yes.

* * *

(page 131) Q. Are you also familiar with Title XVII regarding the collection of breath analysis by the various machines that are authorized by the State of California?

A. In general. I'm sure I've read them, but I can't say that I specifically recall any particular point.

MR. DE MEO: I'd like to, if I might, approach Mr. Person.

THE COURT: Sure.

BY MR. DE MEO:

Q. Directing your attention to Article Five which speaks of collection and handling of samples, Section 1219. Are you familiar with that provision that requires that samples taken for forensic alcohol analysis and breath alcohol analysis shall be collected? Are you familiar with that?

A. I'm familiar with the article, yes.

Q. And are you familiar with the specific section on breath analysis which speaks in terms of the collection of the breath sample?

A. Yes, I am familiar with the word being used.

Q. Are you also familiar with the approval issued by the State of California on the Intoxilyzer 4011 model which indicates that immediate analysis of breath samples collected by direct expiration of the subject into the instrument in which the measurement of alcohol concentration is performed? Are you familiar with that?

A. Yes, I'm aware of that.

Q. Can you state whether or not the procedural guide that (page 132) you have told us about that's in the book or wherever concerning the operation of the Intoxilyzer, does it talk about the collection of a sample?

A. Now that you specifically mention it, I'm not certain, but it possibly does.

Q. In fact, it does talk about the collection of a sample, does it not, with the Intoxilyzer machine?

A. As I said, I'm not sure.

MR. TANSIL: Objection: asked and answered.

THE COURT: This is cross-examination.

THE WITNESS: Very probably it does.

BY MR. DE MEO.

Q. "Very probably it does." Is that your answer?

A. Yes, in the same sense that the regulations speak of collections.

10

STATE OF CALIFORNIA)
COUNTY OF SONOMA)

I, BRENDA B. KRAEGER, a duly certified short-hand reporter of the State of California, do hereby certify:

That the foregoing pages, numbered 1 through 159 inclusive, constitute a full, true and correct transcript of the notes taken by me in the foregoing proceedings in the within-entitled matters.

DATED: May 28, 1981.

/s/ Brenda B. Kraeger

S.C.R. No. C-1896

EXHIBIT A

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Santa Rosa, California 95401
(707) 545-3232

Attorneys for Defendant

**MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SONOMA**

No. 78402 TCR

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs,

vs.

MELINDA PIERSON BERTRAM,
Defendants.

DECLARATION OF JERRY W. CURRY
(Received March 18, 1981)

I, JERRY W. CURRY, declare as follows:

1. My name is JERRY W. CURRY and my business address is 1041 4th Street, Santa Rosa, California;
2. I have a B.A. degree from San Jose State University in Medical Technology, Chemistry and Microbiology. My year of graduation from San Jose State University was 1961;
3. I am a Forensic Alcohol Supervisor duly qualified as such by the State of California to perform Forensic Alcohol Analysis. I have been so qualified since December 21, 1970.
4. I have been associated with Central Pathology Laboratory, whose present address is 1041 4th Street, Santa Rosa, California, since June 1, 1969
5. I am an officer, stockholder, and a member of the Board of Directors of Central Pathology Laboratory, a California corporation engaged in the since of, among other scientific studies, forensic alcohol analysis from human blood, urine and breath.
6. I am the lab manager of Central Pathology Laboratory.
7. I have personally performed forensic alcohol analysis in conjunction with my association with Central Pathology Laboratory, on human samples of blood, urine, and breath and have personally tested and analyzed well over 1,000 samples of blood, well over 1,000 samples of urine and well over 1,000 samples of breath from different humans for alcohol analysis.
8. From approximately 1970 to some date in 1975, Central Pathology Laboratory performed blood, urine and breath alcohol analysis on behalf of the District Attorney's

office of the County of Sonoma in conjunction with said District Attorney's criminal law enforcement duties, which analyses were primarily involved with individuals suspected of driving motor vehicles while under the influence of alcoholic beverages in violation of the laws of the State of California.

9. From 1972 to a date in 1975, law enforcement agencies in Sonoma County, such as the Sheriff's Office, California Highway Patrol and various City Police groups, used a scientific instrument known as an "Intoximeter Field Crimper-Indium Tube Encapsulation Kit" for the purpose of collecting breath samples in the field, of persons suspected of driving a vehicle under the influence of intoxicating beverages, where those persons requested a breath test. Various police stations throughout Sonoma County also had these instruments on hand at their various stations for collection of breath samples. The above described Intoximeter Field Crimper is designed as a capturing device for entrapment of alcohol in a breath sample for *later analysis*.

It is capable of being used in a stationery location or in a vehicle and the device operates by plugging it into a 110 volts receptacle or a cigarette lighter receptacle in a motor vehicle. The device and accompanying kit is simple to use and requires very little room to house same. No scientific background or knowledge is required to operate the device or capture breath samples.

10. The "Intoximeter Field Crimper-Indium Tube Encapsulation Kit" has been approved for use in California for use in breath alcohol analysis since *August 8, 1973*.

11. The Intoximeter Field Crimper referred to in this declaration and as is approved by the State of California, is designed to collect 3 samples of breath, *each of which may be separately analyzed at a time later than the moment of collection thereof.*

12. Between 1972 and a date in 1975, law enforcement personnel in Sonoma County who had collected breath samples with the Intoximeter Field Crimper would submit three samples of breath from each suspect in Indium Tubes to Central Pathology Laboratory. The laboratory would in turn routinely analyze two of the three samples and retain the third sample intact for retesting by the suspect, should a request for same be made by the suspect.

13. At all times mentioned herein, including the present date, Central Pathology Laboratory owned and utilized a "Gas Chromatograph Intoximeter Mark II". This instrument was approved by the State of California for Breath Alcohol Analysis in 1971 and to this day said instrument continues to be so approved. This instrument allows the *immediate* analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed and it also permits later analysis of breath samples which are collected with an Intoximeter Field Crimper-Indium Tube Encapsulation Kit. Both methods of breath alcohol analysis, i.e. the immediate analysis by direct expiration into the instrument and the *later analysis* from collected samples have been authorized in California for several years.

14. To my personal knowledge, breath alcohol analysis results from collected samples of breath using the aforesaid Intoximeter Field Crimper, have been admissible in

Court as evidence in cases involving persons suspected of driving motor vehicles while under the influence of intoxicating liquor.

15. To my knowledge, the aforesaid Intoximeter Field Crimper-Indium Tube Encapsulation Kits are and have been readily available for purchase and use.

16. The Gas Chromatograph Intoximeter Mark II instrument is available for use in the Central Pathology Laboratory at this time and will continue to be available for use in conducting breath alcohol analysis on a scientifically reliable basis.

17. It is my considered opinion that breath samples which are properly collected with the Intoximeter Field Crimper-Indium Tube Encapsulation Kit may be readily and accurately tested and analyzed for alcohol content. Tests and experiments I have personally performed have indicated that a retained breath sample in an indium tube may be scientifically and reliably tested for up to 3 months after the collection of the breath sample.

18. An approved method of collecting breath samples for later analysis for alcohol content has existed since August of 1973. It is my opinion that law enforcement personnel in Sonoma County have had the capability of capturing and retaining said breath samples for the past several years had they desired to do so. The Intoximeter Field Crimper-Indium Tube Encapsulation Kit may be used separate and apart from any other instrument for the breath collection process and does not depend upon any other instrument for the collection of the breath sample.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 16, 1981, at Santa Rosa, California.

/s/ Jerry W. Curry

(Proof of Service Omitted in Printing)

EXHIBIT C

DEMEO & DEMEO

DeMeo Building - 1022 Mendocino Avenue
Santa Rosa, California 95401
(707) 545-3232

Attorneys for Defendant

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SONOMA
No. 78532 TCR

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiffs,
vs.

ALBERT WALTER TROMBETTA,
Defendant.

DECLARATION OF ALBERT WALTER
TROMBETTA IN SUPPORT OF MOTION

(Filed March 3, 1981)

I, ALBERT WALTER TROMBETTA, declare:

1. I am the defendant in the above entitled proceeding;
2. That on or about January 31, 1981 I resided at 4741 Bridle Trail Drive, Santa Rosa, California;

3. On or about January 31, 1981 I was arrested by an Officer of the California Highway Patrol for an alleged violation of California Vehicle Code Section 23102(a);

4. On January 31, 1981, at the Sonoma County Jail, I was administered a breath test on an intoxilyzer machine. No other type of chemical test was administered to me on January 31, 1981 by the California Highway Patrol, or any other law enforcement agency;

5. At no time on January 31, 1981 did any law enforcement officer, or any other person advise me that there would be no sample of my breath preserved.

6. At no time on January 31, 1981, did any law enforcement officer or any other person advise me that no means had been provided by the California Highway Patrol, County of Sonoma, or any other law enforcement agency in this county, for the preservation of a sample of breath;

7. At no time on January 31, 1981, did any law enforcement officer or any other person advise me prior or after the taking of the breath test on the intoxilyzer machine, that there would be no sample of my breath retained for retesting;

8. I would not have submitted to the breath test on the intoxilyzer machine had I been informed that no sample of my breath would be obtained or preserved for retesting;

9. Had I been informed that no sample of my breath would be obtained or preserved for retesting, I would have requested a blood or urine test so that I could have obtained a sample thereof for retesting by an expert of my own choice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 20, 1981, at Santa Rosa, California.

/s/ Albert Walter Trombetta

EXHIBIT D

TITLE 17

FORENSIC ALCOHOL ANALYSIS

**Group 8. Forensic Alcohol Analysis and
Breath Alcohol Analysis**

Article

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2. Requirements for Forensic Alcohol Laboratories
3. Licensing Procedures
4. Training of Personnel
5. Collection and Handling of Samples
6. Methods of Forensic Alcohol Analysis
7. Requirements for Breath Alcohol Analysis
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Detailed Analysis

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PUBLIC HEALTH**Article 7. Requirements for Breath Alcohol Analysis**
Section

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- 1222.1. Forensic Alcohol Laboratory Records
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Article 1. General

1215. Authority. Chapter 5 Sections 436.50-436.63 of Part 1 of Division 1 of the Health and Safety Code.

Note: Authority cited: Sections 102 and 208, Health and Safety Code.

History: 1. New Group 8 (Sections 1215, 1215.1, 1216, 1216.1, 1217, 1217.1 through 1217.8, 1218, 1218.1 and 1218.2) filed 8-10-70; effective thirtieth day thereafter (Register 70, No. 33).

1215.1. Definitions. (a) "Alcohol" means the unique chemical compound, ethyl alcohol, with the exception that reference in these regulations to compounds to be avoided as skin antiseptics includes the generic class of organic compounds known as alcohols.

(b) "Forensic Alcohol Analysis" means the practical application of specialized devices, instruments, and methods by trained laboratory personnel to measure the concentration of ethyl alcohol in samples of blood, breath,

urine, or tissue of persons involved in traffic accidents or traffic violations.

(c) "Breath Alcohol Analysis" means analysis of a sample of a person's expired breath, using a breath testing instrument designed for this purpose, in order to determine the concentration of ethyl alcohol in the person's blood.

(d) "Concentration" means the weight amount of alcohol contained in a unit volume of liquid or a unit volume of gas under specified conditions of temperature and pressure; in the case of a solid tissue specimen, "concentration" means the weight amount of alcohol contained in a unit weight of specimen.

(e) "Forensic Alcohol Laboratory" means a place at which specialized apparatus, instruments, and methods are used by trained laboratory personnel to measure the concentration of alcohol in samples of blood, breath, urine, or tissue of persons involved in traffic accidents or in traffic violations; this may be an activity of a laboratory engaged in activities other than alcohol analysis.

(f) "Forensic Alcohol Supervisor" means a person employed by a forensic alcohol laboratory who can be responsible for all aspects of the performance of forensic alcohol analysis and for the supervision of personnel who perform such analysis.

(g) "Forensic Alcohol Analyst" means a person employed by a forensic alcohol laboratory who performs the technical procedures of forensic alcohol analysis.

(h) "Forensic Alcohol Analyst Trainee" means a person employed by a forensic alcohol laboratory for the purpose of receiving comprehensive practical experience and instruction in the technical procedures of forensic al-

cohol analysis under the supervision of a forensic alcohol supervisor or forensic alcohol analyst.

(i) "Method" means the steps used by a trained person to make a measurement of alcohol concentration.

(j) "Instrument" or "Device" means any item or combination of items of equipment used to make a measurement of alcohol concentration; simple and complex devices are included in this meaning.

(k) "License" means a document issued by the State Department of Health to a laboratory to perform the tests referred to in the Health and Safety Code, Sections 436.51 and 436.52.

(l) "Sample" or "Specimen" means a representative portion of breath, blood, urine, or tissue or of an artificially constituted material, taken for the purpose of measuring its alcohol concentration.

(m) "Alveolar" refers to the smallest air sacs in the lungs and to that portion of the expired breath which is in equilibrium with respect to alcohol with the immediately adjacent pulmonary blood.

(n) "Department" means the California State Department of Health and its duly authorized representatives.

- History:*
1. Amendment of subsections (b), (c), (d) and (e) filed 10-9-70; effective thirtieth day thereafter (Register 70, No. 41).
 2. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

Article 2. Requirements for Forensic Alcohol Laboratories

1216. Authorization Requirement. (a) Every laboratory performing forensic alcohol analysis shall have a valid license issued in accordance with the provisions of these regulations.

(1) Forensic alcohol analysis shall be performed only by persons who meet the qualifications set forth in these regulations for forensic alcohol supervisors, forensic alcohol analysts, or forensic alcohol analyst trainees.

(A) A trainee may perform forensic alcohol analysis only under the supervision of a forensic alcohol supervisor or forensic alcohol analyst.

(2) The Department shall not be limited by these regulations in performing functions in administration of the alcohol analysis and licensing program.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48.)

1216.1. Qualifications for Licensing. (a) A laboratory meets the qualifications for licensing by:

(1) Employing at least one forensic alcohol supervisor. If forensic alcohol analysis is performed by persons other than forensic alcohol supervisors, such persons shall meet the qualifications set forth in these regulations for forensic alcohol analysts or forensic alcohol analyst trainees;

(2) Maintaining a quality control program in forensic alcohol analysis procedures;

(3) Demonstrating satisfactory performance in a proficiency testing program conducted by or approved by the Department;

(4) Passing such on-site inspections as the Department may require;

- (5) Showing ability to meet the requirements set forth in these regulations.
- (b) These qualifications shall be maintained at all times by each licensed laboratory.
- (c) The Department may deny a license or renewal thereof, or take disciplinary action against a licensee, for failure to maintain these qualifications in a manner which meets the Department's standards for approval.
- (d) Whenever a licensed laboratory employing only one forensic alcohol supervisor loses that person, the Department may upon petition of the laboratory extend the license for a period not exceeding 90 days during which time the laboratory shall hire another forensic alcohol supervisor.
 - (1) Such an extension shall be contingent on the laboratory's having in its employ at least one forensic alcohol analyst and upon the laboratory's successfully demonstrating to the Department continued competence in forensic alcohol analysis through such proficiency tests, examinations, and on-site inspections as the Department may require.
- (e) A forensic alcohol supervisor is a person who meets the following qualifications:
 - (1) Possesses a baccalaureate or higher degree, or an equivalent, in chemistry, biochemistry, or other appropriate discipline as determined by the Department;
 - (2) Has two years of experience in performing forensic alcohol analysis, such experience to include experience in interpretation and correlation of alcohol analyses with subjective observations of the demeanor and behavior of persons who have ingested known amounts of ethyl alcohol; or, in lieu of such

two years of experience, satisfactorily completes a training course approved by the Department, such training course to include at minimum the following schedule of subjects:

- (A) Value and purpose of forensic alcohol analysis, including breath alcohol analysis;
 - (B) Physiological action of alcohol;
 - (C) Pharmacology and toxicology of alcohol;
 - (D) Laboratory methods of alcohol analysis;
 - (E) Instruments and procedures for breath alcohol analysis;
 - (F) Practical laboratory demonstration of the student's ability to perform alcohol analysis;
 - (G) Interpretation of results of alcohol analysis, including correlation of alcohol analyses with subjective observations of the demeanor and behavior of persons who have ingested known amounts of alcohol;
 - (H) Court testimony;
 - (I) Court decisions regarding chemical tests of alcohol to determine alcohol influence; and
 - (J) Requirements of these regulations;
- (3) Successfully demonstrates accuracy in the analysis of proficiency test samples submitted by the Department, and successfully passes examinations prescribed by the Department;
- (4) Demonstrates the ability to adhere to the provisions of these regulations; or (in lieu of (1) and (2) above)
- (5) Either is a person who, prior to January 1, 1971, qualified as director of a clinical laboratory op-

erating under the provisions of the California Business and Professions Code, or is a person who, for a period of one year prior to January 1, 1971, has been employed in the activities of a forensic alcohol supervisor.

(f) A forensic alcohol analyst is a person who meets the following qualifications:

- (1) Successfully completes at least 60 semester-hours, or their equivalent in quarter-hours, of college level courses, including 8 hours of general chemistry and 3 hours of quantitative analysis;
- (2) Successfully completes a training period in alcohol analysis on forensic or clinical specimens in a forensic alcohol laboratory or in a clinical laboratory;
- (3) Performs during the training period a minimum of 25 analyses of alcohol concentration in blood samples, at least half of which contain alcohol;
- (4) Successfully demonstrates accuracy in the analysis of proficiency test samples submitted by the Department, and successfully passes, examinations prescribed by the Department.
- (5) Demonstrates ability to adhere to the provisions of these regulations; or (in lieu of (1), (2), and (3) above)
- (6) Either is a person who, prior to January 1, 1971, was a clinical laboratory technologist licensed under the provisions of the California Business and Professions Code, or is a person who, for a period of one year prior to January 1, 1971, has been employed in the activities of a forensic alcohol analyst.

(g) A forensic alcohol analyst trainee is a person who meets the following qualifications:

- (1) Meets the educational qualification set forth as (1) for a forensic alcohol analyst;

(2) Is employed by a licensed forensic alcohol laboratory.

History: 1. Amendment of subsection (c) (1) filed 10-9-70; effective thirtieth day thereafter (Register 70, No. 41).

2. Amendment of subsection (b) (2) filed 8-2-72; effective thirtieth day thereafter (Register 72, No. 32).
3. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).
4. Editorial correction (Register 76, No. 24).

Article 3. Licensing Procedures

1217. Forensic Alcohol Laboratory License. (a) Upon receipt of a completed application which shows ability to meet the requirements set forth in these regulations, and upon payment of any required fee, the Department shall submit such proficiency test samples and perform such examinations as are required for that laboratory to complete the qualifications.

(b) Upon the laboratory's successfully completing all the qualifications, the Department shall issue to the applicant laboratory a forensic alcohol laboratory license.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48.)

1217.1. Renewal of Licenses. (a) Licenses under these regulations shall be renewed as required by the Department as long as the activity requiring authorization continues. Renewal shall be contingent upon the laboratory continuing in the qualifications set forth in these regulations.

(1) A forensic alcohol laboratory license shall be valid from January 1 to December 31 of a calendar year. Applications for renewal and applicable fees

shall be submitted to the Department on or before October 1 of each year.

(2) Failure to apply for renewal shall result in forfeiture after a period of three months from the day on which the application for renewal should have been submitted, with the exception that the Department may grant a temporary extension under special circumstances.

(3) An application for renewal shall not list as a forensic alcohol analyst trainee any person who fails to comply with the requirements of Section 1216.1 (f) (4) within a period of one year after he was first listed with the Department as a trainee. The Department may extend this period for a justifiable reason, such as illness.

- History:* 1. New subsection (c) filed 4-7-71; effective thirtieth day thereafter (Register 71, No. 15).
2. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1217.2. Application Forms. Application for a license and renewal thereof, shall be made on forms furnished by the Department. The applicant shall set forth all pertinent information called for by the form.

1217.3. Report of Change or Discontinuance. (a) A person responsible for the operation of a forensic alcohol laboratory shall report to the Department in writing within 30 days any change in qualified personnel who may be performing forensic alcohol analysis, change of ownership, change of address or change or discontinuance of an activity authorized under these regulations.

(b) Such reports shall be made on forms furnished by the Department and shall set forth all pertinent information called for by the form.

(c) Persons who formerly qualified as forensic alcohol supervisors or forensic alcohol analysts in another laboratory may be required to demonstrate again their ability to meet the requirement of Section 1216.1 (e) (3) or 1216.1 (f) (4) using the method, apparatus and facilities of the forensic alcohol laboratory which newly lists them in such a Report of Change or Discontinuance.

History: 1. Amendments filed 10-9-70; effective thirtieth day thereafter (Register 70, No. 41).

2. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).
3. Editorial correction (Register 76, No. 24).

1217.4. License Implications. Licenses issued under these regulations shall not imply approval of anything carried out by a laboratory other than what is specified on the document.

1217.5. Licensing Records. Forensic Alcohol Laboratory Licenses shall become part of permanent records available to the courts for legal proceedings or to the Department.

1217.6. Inspection and Additional Requirements. (a) Display of Licenses. Licenses issued under these regulations shall be displayed on request to representatives of the Department.

(b) Access to Premises. The Department may enter at all reasonable times upon any laboratory for the purpose of determining whether or not there is compliance with the provisions of these regulations.

1217.7. Surveys and Proficiency Tests. (a) Laboratories having been licensed or applying for licensing as

forensic alcohol laboratories shall be subject to on-site surveys by representatives of the Department, the results of which must meet the requirements of these regulations, and shall accept periodic evaluation samples, perform analyses and report the results of such analyses to the Department.

(b) These analytical results shall be used by the Department to evaluate the accuracy of the forensic alcohol analyses performed by the laboratory, and the results must meet the requirements of these regulations.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1217.8. Fees and Other Procedures. The annual application fee for a Forensic Alcohol Laboratory License or its renewal shall be one hundred dollars (\$100). A laboratory operated by the state, city or county or other public organization shall be exempt from the annual application fee requirement. Other procedures in the administration of these regulations shall be carried out as set forth in Chapter 5 (commencing with section 436.50) of Part 1 of Division 1 of the Health and Safety Code. Such other procedures include suspension or revocation of license, denial of license, and disciplinary action.

Article 4. Training of Personnel

1218. Training Program Approval. Any organization, laboratory, institution, school, or college conducting a course of instruction for persons to qualify under these regulations shall submit a course summary and list of instructors and their qualifications to the Department for approval.

1218.1. Additional Requirements. At the discretion of the Department, any phase or portion of a training program shall be subject to alteration in an effort to update the program as technological advances are made or if a portion has been judged inappropriate.

1218.2. Contracts. The Department may contract with persons it deems qualified to administer such practical tests and written or oral examinations as may be required under these regulations. This section shall not be construed to authorize the delegation of any discretionary functions conferred on the Department by law, including, but not limited to, the evaluation of tests and examinations.

Article 5. Collection and Handling of Samples

1219. General. Samples taken for forensic alcohol analysis and breath alcohol analysis shall be collected and handled in a manner approved by the Department. The identity and integrity of the samples shall be maintained through collection to analysis and reporting.

NOTE: Authority cited: Sections 102 and 208, Health and Safety Code. Reference: Section 436.50, Health and Safety Code.

History: 1. New Article 5 (§§1219, 1219.1, 1219.2, 1219.3), filed 10-9-70, effective thirtieth day thereafter (Register 70, No. 41).

2. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1219.1. Blood Collection and Retention. (a) Blood samples shall be collected by venipuncture from living individuals as soon as feasible after an alleged offense and

only by persons authorized by Section 133354 of the Vehicle Code.

(b) Sufficient blood shall be collected to permit duplicate determinations.

(c) Alcohol or other volatile organic disinfectant shall not be used to clean the skin where a specimen is to be collected. Aqueous benzalkonium chloride (zephiran), aqueous merthiolate or other suitable aqueous disinfectant shall be used.

(d) Blood samples shall be collected using sterile, dry hypodermic needles and syringes, or using clean, dry vacuum type containers with sterile needles. Reusable equipment, if used, shall not be cleaned or kept in alcohol or other volatile organic solvent.

(e) The blood sample shall be deposited into a clean, dry container which is closed with an inert stopper.

(1) Alcohol or other volatile organic solvent shall not be used to clean the container.

(2) The blood shall be mixed with an anticoagulant and a preservative.

(f) When blood samples for forensic alcohol analysis are collected post-mortem, all practical precautions to insure an uncontaminated sample shall be employed, such as:

(1) Samples shall be obtained prior to the start of any embalming procedure. Blood samples shall not be collected from the circulatory system effluent during arterial injection of embalming fluid. Coroner's samples do not need a preservative added if stored under refrigeration.

(2) Care shall be taken to avoid contamination by alcohol from the gastrointestinal tract directly, or

by diffusion therefrom. The sample shall be taken from a major vein or the heart.

(g) In order to allow for analysis by the defendant, the remaining portion of the sample shall be retained for one year after the date of collection.

(1) In coroner's cases, blood samples shall be retained for at least 90 days after date of collection.

(2) Whenever a sample is requested by the defendant for analysis and a sufficient sample remains, the forensic alcohol laboratory or law enforcement agency in possession of the original sample shall continue such possession, but shall provide the defendant with a portion of the remaining sample in a clean container together with a copy or transcript of the identifying information carried on the original sample container.

History: 1. Amendment of subsection (d) filed 4-7-71; effective thirtieth day thereafter (Register 71, No. 15).

2. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1219.2. Urine Collection and Retention. (a) The only approved urine sample shall be a sample collected no sooner than twenty minutes after first voiding the bladder.

(b) The specimen shall be deposited in a clean, dry container which also contains a preservative.

(c) In order to allow for analysis by the defendant, the remaining portion of the sample shall be retained for one year after the date of collection.

(1) Whenever a sample is requested by the defendant for analysis and a sufficient sample remains, the forensic alcohol laboratory or law enforcement

agency in possession of the original sample shall continue such possession, but shall provide the defendant with a portion of the remaining sample in a clean container together with a copy or transcript of the identifying information carried by the original sample container.

- History:* 1. Amendment of subsection (a) filed 4-7-71; effective thirtieth day thereafter (Register 71, No. 15).
2. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1219.3. Breath Collection. A breath sample shall be expired breath which is essentially alveolar in composition. The quantity of the breath sample shall be established by direct volumetric measurement. The breath sample shall be collected only after the subject has been under continuous observation for at least fifteen minutes prior to collection of the breath sample, during which time the subject must not have ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked.

- History:* 1. Amendment filed 4-7-71; effective thirtieth day thereafter (Register 71, No. 15).

Article 6. Methods of Forensic Alcohol Analysis

1220. General. (a) All laboratory methods used for forensic alcohol analysis shall be subject to standards set forth in this Article.

(b) Each licensed forensic alcohol laboratory shall have on file with the Department detailed, up-to-date written descriptions of each method it uses for forensic alcohol analysis.

- (1) Such descriptions shall be immediately available to the person performing an analysis and shall be available for inspection by the Department on request.

(2) Each such description shall include the calibration procedures and the quality control program for the method.

NOTE: Authority cited: Sections 102 and 208, Health and Safety Code. Reference Section 436.50, Health and Safety Code.

History: 1. New Article 6 (§§ 1220.1 through 1220.4) filed 10-9-70; effective thirtieth day thereafter (Register 70, No. 41).

2. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1220.1. Standards of Performance. (a) Methods for forensic alcohol analysis shall meet the following standards of performance:

(1) The method shall be capable of the analysis of a reference sample of known alcohol concentration within accuracy and precision limits of plus or minus 5 percent of the value; these limits shall be applied to alcohol concentrations which are 0.10 grams per 100 milliliters or higher;

(2) The method shall be capable of the analysis of ethyl alcohol with a specificity which is adequate and appropriate for traffic law enforcement.

(3) The method should be free from interference from anticoagulants and preservatives added to the sample;

(4) Blood alcohol results on post-mortem samples shall not be reported unless the oxidizable substance is identified as ethyl alcohol by qualitative test;

(5) The method shall give a test result which is always less than 0.01 grams of alcohol per 100 milliliters of blood when living subjects free of alcohol are tested.

(b) The ability of methods to meet the standards of performance set forth in this Section shall be evaluated

by the Department using a laboratory's proficiency test results and such ability must meet the requirements of these regulations.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1220.2. Standards of Procedure. (a) Methods for forensic alcohol analysis shall meet the following standards of procedure:

(1) The method shall be calibrated with standards which are water solutions of alcohol.

(A) Such alcohol solutions are secondary standards.

(B) Each forensic alcohol laboratory shall establish the concentration of each lot of secondary alcohol standards it uses, whether prepared or acquired, by an oxidimetric method which employs a primary standard, such as United States National Bureau of Standards potassium dichromate;

(2) The procedure shall include blank and secondary alcohol standard samples at least once each day that samples are subjected to forensic alcohol analysis.

(A) The blank and secondary alcohol standard samples shall be taken through all steps of the method used for forensic alcohol analysis of samples.

(3) The procedure shall also include analysis of quality control, reference samples as described in Section 1220.3 and shall include at least duplicate analyses of samples for forensic alcohol analysis.

(A) A quality control reference sample shall not be taken from the same lot of alcohol solution which is used as a secondary alcohol standard.

(4) Alcohols or other volatile organic solvents shall not be used to wash or rinse glassware and instruments used for alcohol analysis;

(5) All instruments used for alcohol analysis shall be in good working order and routinely checked for accuracy and precision.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1220.3. Quality Control Program. (a) Methods for forensic alcohol analysis shall be performed in accordance with the following quality control program:

(1) For each method of forensic alcohol analysis it performs, each forensic alcohol laboratory shall make or acquire a suitable quality control reference material containing alcohol, a sample of which it shall analyze along with each set of samples; the alcohol concentration in the reference material shall be between 0.10 and 0.20 grains per 100 milliliters of liquid.

(2) For each lot of quality control reference material, the laboratory shall determine a mean value of at least 20 replicate analyses, at a rate of no more than 2 analyses per day, with the method used for analysis of samples for forensic alcohol analysis;

(3) Acceptable limits of variation for the method shall be set as follows:

(A) The lower limit shall be calculated by subtracting, from the mean value, 0.01 grams per 100 milliliters;

(B) The higher limit shall be calculated by adding, to the mean value, 0.01 grains per 100 milliliters;

(4) At least one sample of the quality control reference material shall be analyzed with each set of samples analyzed for the purpose of forensic alcohol analysis;

(5) Whenever analysis of the quality control reference material is outside the acceptable limits, the method shall be regarded to be in error and a forensic alcohol supervisor shall take remedial action to investigate and correct the source of error;

(6) Until such time as the error has been corrected, as shown by return of the analysis of the quality control reference material to values within the acceptable limits, no samples shall be analyzed for the purpose of forensic alcohol analysis.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1220.4. Expression of Analytical Results. (a) With the exception of tissue analysis, all analytical results shall be expressed in terms of the alcohol concentration in blood, based on the number of grams of alcohol per 100 milliliters of blood.

(1) The symbols, grams %, %, and % (W/V), shall be regarded as acceptable abbreviations of the phrase, grams per 100 milliliters of liquid.

(b) Analytical results shall be reported to the second decimal place, deleting the digit in the third decimal place when it is present.

(c) Blood alcohol concentrations less than 0.01% in living subjects may be reported as negative.

(d) Blood alcohol concentrations less than 0.02% on post-mortem blood samples may be reported as negative.

(e) A urine alcohol concentration shall be converted to an equivalent blood alcohol concentration by a calculation based on the relationship: the amount of alcohol in 1.3 milliliters of blood is equivalent to the amount of alcohol in 1 milliliter of urine.

(f) A breath alcohol concentration shall be converted to an equivalent blood alcohol concentration by a calculation based on the relationship: the amount of alcohol in 2,100 milliliters of alveolar breath is equivalent to the amount of alcohol in 1 milliliter of blood.

(g) Tissue analysis results shall be expressed in terms of a weight amount of alcohol in a unit weight of the specimen.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

2. Editorial correction (Register 76, No. 24).

Article 7. Requirements for Breath Alcohol Analysis

1221. General. Breath alcohol analysis shall be performed in accordance with standards set forth in this Article.

NOTE: Authority cited: Sections 102 and 208, Health and Safety Code. Reference: Section 436.50, Health and Safety Code.

History: 1. New Article 7 (Sections 1221, 1221.1 through 1221.5) filed 10-9-70; effective thirtieth day thereafter (Register 70, No. 41).

2. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1221.1. Authorized Procedures. (a) Breath alcohol analysis shall be performed only with instruments and related accessories which meet the standards of performance set forth in these regulations.

(b) Such instruments may be used for the analysis of breath samples in places other than licensed forensic alcohol laboratories and by persons other than forensic alcohol supervisors, forensic alcohol analysts and forensic

alcohol analyst trainees only if such places and persons are under the direct jurisdiction of a governmental agency or licensed forensic alcohol laboratory.

(1) Breath alcohol analysis by persons other than forensic alcohol supervisors, forensic alcohol analysts and forensic alcohol analyst trainees shall be restricted to the immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

(2) Except for the requirements of Section 1220.-4, such immediate analysis shall not be subject to the requirements of Article 6.

(c) Breath alcohol analysis may be performed on samples which are collected with a sample capturing instrument designed for entrapment of a breath sample or for entrapment of the alcohol in a breath sample for later analysis.

(1) Whereas persons other than forensic alcohol supervisors, forensic alcohol analysts or forensic alcohol analyst trainees may perform sample capture, the actual later analysis of alcohol in captured samples to determine persons' blood alcohol concentrations shall be performed only by a licensed forensic alcohol laboratory using a method which meets the standards set forth in Article 6 of these regulations.

(2) The combined procedures of sample capture and later analysis shall have the ability to meet the standards of performance set forth in Section 1221.2.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1221.2. Standards of Performance. (a) Instruments for breath alcohol analysis shall meet the following standards of performance:

(1) The instrument and any related accessories shall be capable of the collection and analysis of breath

specimens which are essentially alveolar in composition;

(2) The instrument shall be capable of analyzing a blank sample and of analyzing a suitable reference sample, such as air equilibrated with a reference solution of known alcohol content at a known temperature;

(3) The instrument shall be capable of the analysis of a reference sample of known alcohol concentration within accuracy and precision limits of plus or minus 0.01 grams % of the true value; these limits shall be applied to alcohol concentrations from 0.10 grams % to 0.30 grams %;

(4) The instrument shall be capable, in a controlled experiment, of breath alcohol analysis which results in a determination of a subject's blood alcohol concentration which has correlation with his actual blood alcohol concentration as measured on a blood sample taken at approximately the same time as the breath sample;

(5) The instrument shall be capable of breath alcohol analysis which results in a concentration less than 0.01 grams of alcohol per 100 milliliters of blood when alcohol-free subjects are tested.

(b) For sample capturing instruments there shall be the following additional standard:

(1) The alcohol concentration of captured samples shall be sufficiently stable that the requirements set forth in (a) (3) and (a) (4) above can be met when 14 days elapse between sample capture and later analysis.

(c) The ability of instruments and any related accessories to meet the standards of performance set forth in this Section shall be subject to evaluation by the Department.

History: 1. Repealer of subsection (b) and relettering of (c), (d), (e), (f) and (g) to (b), (c), (d),

- (e) and (f) filed 4-7-71; effective thirtieth day thereafter (Register 71, No. 15).
- 2. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1221.3. Instrument Evaluations. (a) On or after January 1, 1971, all organizations selling or offering for sale instruments for breath alcohol analysis in this State shall register such instruments and related accessories with the Department.

(b) Such registration shall be made on forms furnished by the Department and shall set forth all pertinent information called for by the form in a manner which meets the Department's standards for approval.

(c) On or after January 1, 1972, only such types and models of instruments and related accessories as have been approved by the Department shall be used for breath alcohol analysis in this State.

(d) Approval or disapproval shall be based on laboratory evaluation by the Department of the abilities of representative items of such instruments and related accessories to meet the standards of performance set forth in Section 1221.2.

(1) It shall be the responsibility of an instrument's manufacturer, or the person requesting the evaluation, to make arrangements with the Department to have an instrument evaluated.

(2) The manufacturer, or the person requesting the evaluation, shall provide the Department with the instruments, related accessories, chemical reagents, full directions and any other materials needed for the evaluation, and shall provide the Department with such technical consultation as is necessary during the evaluation.

(e) The Department shall report the results of the evaluation to the manufacturer or the person requesting the evaluation, and shall have rights of promulgation of the results.

(f) The Department shall not accept for evaluation any instrument or procedure for which analysis is made esoteric by reason of secrecy, commercial unavailability or incomplete directions.

(g) The Department shall not accept for evaluation any instrument or accessory for which the information, data and documents submitted with the registration fail to support a judgment by the Department that the instrument or accessory is in ostensible compliance with the requirements of these regulations when operated according to the manufacturer's directions.

(h) On or after January 1, 1972, the Department shall provide on request a list of instruments and related accessories approved for breath alcohol analysis.

(i) Approval by the Department of a particular type and model of instrument or accessory shall signify its approval of all such instruments and accessories which are of the same type and model as those instruments and accessories actually subjected to laboratory evaluation by the Department.

(1) The Department may also approve modified versions of such approved instruments and accessories when, in the judgment of the Department, the modifications do not alter the abilities of such instruments and accessories to meet the standards of performance set forth in Section 1221.2 inasmuch as the modified versions are equivalent in performance to the approved versions.

(2) The Department may also approve related accessories other than those manufactured by the manufacturer of the approved accessories when, in the judgment of the Department, such accessories are equivalent to the approved accessories.

(3) In cases of requests for approvals on the basis of equivalence, the manufacturer, or the person requesting the approval, shall provide the Department with such information, data and documents as the Department requires to reach a judgment.

(4) The manufacturer, or the person requesting the approval, shall additionally provide the Department with such instruments, related accessories, chemical reagents, full directions and any other materials needed for the Department to reach a judgment, and shall provide the Department with such technical consultation as is needed.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

2. Editorial correction (Register 76, No. 24).

1221.4. Standards of Procedure. (a) Procedures for breath alcohol analysis shall meet the following standards:

(1) For each person tested, breath alcohol analysis shall include analysis of 2 separate breath samples which result in determinations of blood alcohol concentrations which do not differ from each other by more than 0.02 grams per 100 milliliters.

(2) The accuracy of instruments shall be determined.

(A) For an instrument designed for immediate analysis of breath samples collected by direct expiration by the subject into the instrument, such determination of accuracy shall consist, at a minimum, of periodic analysis of a reference sam-

ple as described in Section 1221.2(a) (3) and which is provided by a forensic alcohol laboratory.

1. Such analysis shall be performed by an operator as defined in Section 1221.4 (a) (5), and the results shall be used by a forensic alcohol laboratory to determine if the instrument continues to meet the standard of accuracy set forth in Section 1221.2 (a) (3).

(B) For disposable components of an instrument designed for capture of samples for later analysis, such determination of accuracy shall consist of analysis of a reference sample, performed by a forensic alcohol laboratory, using representative disposable components randomly selected from each manufacturer's lot used, and the results shall be used by a forensic alcohol laboratory to determine if the instrument meets the standard of accuracy set forth in Section 1221.2 (a) (3).

1. For a nondisposable component, if any, which is used repetitively for sample capture in disposable components, such determination of accuracy shall consist, at a minimum, of periodic analysis of a reference sample as described in Section 1221.2 (a) (3) and which is provided by a forensic alcohol laboratory.

2. Whereas capture of such a sample shall be performed by an operator as defined in Section 1221.4 (a) (5), the captured sample shall be analyzed by a forensic alcohol laboratory, and the results shall be used by a forensic alcohol laboratory to determine if the instrument continues to meet the standard of accuracy set forth in Section 1221.2 (a) (3).

(C) For the purposes of such determinations of accuracy, "periodic" means either a pe-

riod of time not exceeding 10 days or following the testing of every 150 subjects, whichever comes sooner.

(3) Breath alcohol analysis shall be performed only with instruments for which the operators have received training, such training to include at minimum the following schedule of subjects:

- (A) Theory of operation;
- (B) Detailed procedure of operation;
- (C) Practical experience;
- (D) Precautionary checklist;
- (E) Written and/or practical examination.

(F) For sample capturing instruments, training may exclude the later analysis which is performed in a forensic alcohol laboratory.

(G) Persons who have been engaged in the use of an instrument for the six months prior to January 1, 1971, shall be considered to have been trained and examined in the procedures for that instrument.

(4) Training in the procedures of breath alcohol analysis shall be under the supervision of persons who qualify as forensic alcohol supervisors, forensic alcohol analysts or forensic alcohol analyst trainees in a licensed forensic alcohol laboratory.

(A) After approval as set forth in Section 1218, the forensic alcohol laboratory is responsible for the training and qualifying of its instructors.

(5) An operator shall be a forensic alcohol supervisor, forensic alcohol analyst, forensic alcohol analyst trainee or a person who has completed successfully the training described under Section 1221.4 (a) (3) and who may be called upon to operate a breath testing instrument in the performance of his duties.

(6) Records shall be kept for each instrument to show the frequency of determination of accuracy and the identity of the person performing the determination of accuracy.

(A) Records shall be kept for each instrument at a licensed forensic alcohol laboratory showing compliance with this Section.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1221.5. Expression of Analytical Results. Results of breath alcohol analysis shall be expressed as set forth in Section 1220.4.

Article 8. Records

1222. General. Forensic alcohol laboratories and law enforcement agencies shall maintain records which clearly represent their activities which are covered by these regulations. Such records shall be available for inspection by the Department on request.

NOTE: Authority cited: Sections 102 and 208, Health and Safety Code. Reference: Section 436.50, Health and Safety Code.

History: 1. New Article 8 (§§ 1222, 1222.1, 1222.2) filed 10-9-70; effective thirtieth day thereafter (Register 70, No. 41).

1222.1. Forensic Alcohol Laboratory Records. (a) Each laboratory which is licensed to perform forensic alcohol analysis shall keep the following records for a period of at least three years:

(1) An up-to-date record of persons in its employ who are qualified as forensic alcohol supervisors and forensic alcohol analysts; the record shall include the qualifications of each such person, including edu-

cation, experience, training and performance in proficiency tests and examinations;

(2) A list of persons in its employ who are forensic alcohol analyst trainees, the date on which each such person began his training period and the number and results of analyses performed during the training period;

(3) Records of samples analyzed by that laboratory under these regulations, their results and the identity of persons performing the analyses;

(4) Records of the quality control program;

(5) Records of laboratory performance evaluation in alcohol analysis as shown by results of proficiency tests;

(6) Records of such determinations of accuracy of breath testing instruments as a laboratory may perform for law enforcement agencies;

(7) Records of such training as a laboratory may provide to persons to operate breath testing instruments for law enforcement agencies.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

1222.2. Breath Alcohol Analysis Records. (a) Each agency shall keep the following records for breath testing instruments which are under its jurisdiction:

(1) Records of instrument determinations of accuracy;

(2) Records of analyses performed, results and identities of the persons performing analyses;

(3) At the location of each instrument, the precautionary checklist to be used by operators of the instrument.

History: 1. Amendment filed 11-24-75; effective thirtieth day thereafter (Register 75, No. 48).

2. Editorial correction (Register 76, No. 24).

EXHIBIT E

LIST OF INSTRUMENTS AND RELATED
ACCESSORIES APPROVED FOR BREATH
ALCOHOL ANALYSIS

Date of Preparation of this List: December 20, 1979

Section 1221.3(e) of the Regulations Relating to Forensic Alcohol Analysis and Breath Alcohol Analysis, contained in Title 17 of the California Administrative Code, states that only such instruments as have been approved by the California State Department of Health Services shall be used for breath alcohol analysis in this State; approval shall be based on laboratory evaluation by the Department of such instruments' abilities to meet the standards of performance set forth in Section 1221.2 of the regulations.

The following is the list of instruments and related accessories which are so approved. This list supersedes and replaces the list published on June 6, 1978. Instruments are named in alphabetical order. Source or sources of accessories are shown in parentheses.

Approved Instrument and Model Number:

Alco-Analyzer Gas Chromatograph
(No Model Number Designated)

Manufacturer:

Luckey Laboratories, Inc.
7252 Osbun Road
San Bernardino, CA 92404

Related Accessories Approved for this Instrument:

Luckey Simulator, set to maintain a solution temperature of 34°C +/— 0.2°C.
(Luckey Laboratories, Inc.)

Luckey 5-inch Gas Chromatograph Chart Recorder
and Sola Transformer.
(Luckey Laboratories, Inc.)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

Alco-Analyzer Gas Chromatograph Model 1000

Manufacturer:

Luckey Laboratories, Inc.
7252 Osbun Road
San Bernardino, CA 92404

Related Accessories Approved for this Instrument:

Luckey Simulator, set to maintain a solution temperature of 34°C +/— 0.2°C.

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Subject must take a deep breath and blow one continuous breath sample of 10 seconds or more and must continue to blow until the whistle stops.

Approved Instrument and Model Number:

 *Breathalyzer Model 900**

Manufacturer:

Smith and Wesson Electronics Company
2100 Roosevelt Avenue
Springfield, Massachusetts 01101

Related Accessories Approved for this Instrument:

*Formerly manufactured by Stephenson Corporation.

Equilibrator*. (Smith and Wesson Electronics Company)

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Breathalyzer Solution Ampoules, Mouthpieces, and Bubblers; Breathalyzer Model 900 Test Records; Output Gauge* and Ampoule Gauge*. (Smith and Wesson Electronics Company)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

Breathalyzer Model 900A

Manufacturer:

Smith and Wesson Electronics Company
2100 Roosevelt Avenue
Springfield, Massachusetts 01101

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Breathalyzer Solution Ampoules, Mouthpieces, and Bubblers; Breathalyzer Model 900A Test Records;

*Formerly manufactured by Stephenson Corporation.

Output Gauge* and Ampoule Gauge*. (Smith and Wesson Electronics Company)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

Breathalyzer Model 1000

Manufacturer:

Smith and Wesson Electronics Company
2100 Roosevelt Avenue
Springfield, Massachusetts 01101

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Breathalyzer Solution Ampoules, Mouthpieces, and Bubblers; Breathalyzer Model 1000 Test Record; Output Gauge and Ampoule Gauge. (Smith and Wesson Electronics Company)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

*Formerly manufactured by Stephenson Corporation.

Approved Instrument and Model Number:

Gas Chromatograph Intoximeter Mark II

Manufacturer:

CalDetect, Inc.
101 West Nevin Avenue
Richmond, CA 94801

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of 34°C +/— 0.2°C. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of 34°C +/— 0.2°C. (Smith and Wesson Electronics Company)

Digital Concentration Readout Accessory. (CalDetect, Inc.)

External Chart Recorder, MPI Model MP-1027. (Cal-Detect, Inc.)

Mouthpieces; Intoximeter Waste Bag Assembly with Check Valve and Restrictor; Plug-in Calibrator. (Cal-Detect, Inc.)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath sample collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Also, analysis of breath samples which are collected with an Intoximeter Field Crimper-Indium Tube Encapsulation Kit, a breath alcohol capturing device designed for entrapment of the alcohol in a breath sample for later analysis using a Gas Chromatograph Intoximeter Mark II.

*Formerly manufactured by Stephenson Corporation.

Approved Instrument and Model Number:

Gas Chromatograph Intoximeter Mark IV

Manufacturer:

CalDetect, Inc.
101 West Nevin Avenue
Richmond, CA 94801

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of 34°C +/— 0.2°C. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of 34°C +/— 0.2°C. (Smith and Wesson Electronics Company)

Mouthpieces. (CalDetect, Inc.)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath sample collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Also, analysis of breath samples which are collected with an Intoximeter Field Crimper-Indium Tube Encapsulation Kit, a breath alcohol capturing device designed for entrapment of the alcohol in a breath sample for later analysis using a Gas Chromatograph Intoximeter Mark IV.

*Formerly manufactured by Stephenson Corporation.

Approved Instrument and Model Number

*Intoxilyzer Model 4011**

Manufacturer:

CMI, Incorporated
P.O. Drawer D, Old Hwy 6
Minturn, Colorado 81645

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator**, set to maintain a solution temperature of $34^{\circ}\text{C} +/— 0.2^{\circ}\text{C}$, and modified to have outlet tube tightly secured to the Simulator outlet. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/— 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Luckey Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/— 0.2^{\circ}\text{C}$. (Luckey Laboratories, Inc.)

Mouthpieces; Evidence Card. (CMI, Incorporated)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number

Intoxilyzer Model 4011A

Manufacturer:

CMI, Incorporated
P.O. Drawer D, Old Hwy 6
Minturn, Colorado 81645

*Formerly manufactured by Omieron Systems Corporation.

**Formerly manufactured by Stephenson Corporation.

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of $34^{\circ}\text{C} +/— 0.2^{\circ}\text{C}$, and modified to have outlet tube tightly secured to the Simulator outlet. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/— 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Lucker Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/— 0.2^{\circ}\text{C}$. (Lucker Laboratories, Inc.)

Mouthpieces; Evidence Card. (CMI, Incorporated)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number

Intoxilyzer Model 4011-AR

Manufacturer:

CMI, Incorporated
P.O. Drawer D, Old Hwy 6
Minturn, Colorado 81645

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of $34^{\circ}\text{C} +/— 0.2^{\circ}\text{C}$, and modified to have outlet tube tightly secured to the Simulator outlet. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/— 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Lucker Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/— 0.2^{\circ}\text{C}$. (Lucker Laboratories, Inc.)

Mouthpieces; Evidence Card. (CMI, Incorporated)

*Formerly manufactured by Stephenson Corporation.

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number

Intoxilyzer Model 4011-AW

Manufacturer:	Modified by:
CMI, Incorporated P.O. Drawer D, Old Hwy 6 Minturn, Colorado 81645	State of California Department of Justice Bureau of Forensic Services P.O. Box 133337 Sacramento, CA 95813

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$, and modified to have outlet tube tightly secured to the Simulator outlet. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company)

Luckey Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$. (Luckey Laboratories, Inc.)

Mouthpieces; Evidence Card. (CMI, Incorporated)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

*Formerly manufactured by Stephenson Corporation.

Approved Instrument and Model Number:

*Intoximeter Field Crimper-Indium Tube
Encapsulation Kit*

(No Model Number Designated)

Manufacturer:

CalDetect, Inc.
101 West Nevin Avenue
Richmond, CA 94801

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of 34°C +/—0.2°C. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of 34°C +/—0.2°C. (Smith and Wesson Electronics Company)

Gas Chromatograph Intoximeter Mark II with or without Digital Concentration Readout Accessory. (CalDetect, Inc.)

Intoximeter Waste Bag Assembly with Check Valve and Restrictor. (CalDetect, Inc.)

Authorized Breath Alcohol Analysis with this Instrument:

Analysis of breath samples collected with this breath alcohol capturing device designed for entrapment of the alcohol in a breath sample for later analysis.

Restriction: No more than 14 days shall elapse between the time a sample is captured by the Intoximeter Field Crimper-Indium Tube Encapsulation Kit and the time that sample is analyzed in Gas Chromatograph Intoximeter Mark II or Gas Chromatograph Intoximeter Mark IV.

*Formerly manufactured by Stephenson Corporation.

State Department of Health*
Clinical Chemistry Laboratory

LIST OF INSTRUMENTS AND RELATED
ACCESSORIES APPROVED FOR BREATH
ALCOHOL ANALYSIS

Date of Preparation of this List: June 6, 1978

Section 1221.3(c) of the Regulations Relating to Forensic Alcohol Analysis and Breath Alcohol Analysis, contained in Title 17 of the California Administrative Code, states that only such instruments as have been approved by the California State Department of Health shall be used for breath alcohol analysis in this State; approval shall be based on laboratory evaluation by the Department of such instruments' ability to meet the standards of performance set forth in Section 1221.2 of the regulations.

The following is the list of instruments and related accessories which are so approved. This list supersedes and replaces the list published on August 8, 1973. Instruments are named in alphabetical order. Source or sources of accessories are shown in parentheses.

Approved Instrument and Model Number:

Alco-Analyzer Gas Chromatograph

(No Model Number Designated)

Manufacturer:

Luckey Laboratories, Inc.
7252 Osbun Road
San Bernardino, CA 92404

Related Accessories Approved for this Instrument:

Luckey Simulator, set to maintain a solution temperature of 34°C +/— 0.2°C. (Luckey Laboratories, Inc.)

Luckey 5-inch Gas Chromatograph Chart Recorder and Sola Transformer. (Luckey Laboratories, Inc.)

*On and after July 1, 1978, this Department will be named the State Department of Health Services.

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

*Breathalyzer Model 900**

Manufacturer:

Smith and Wesson Electronics Company
2100 Roosevelt Avenue
Springfield, Massachusetts 01101

Related Accessories Approved for this Instrument:

Equilibrator*. (Smith and Wesson Electronics Company)

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of 34°C +/— 0.2°C. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of 34°C +/— 0.2°C. (Smith and Wesson Electronics Company)

Breathalyzer Solution Ampoules, Mouthpieces, and Bubblers; Breathalyzer Model 900 Test Records; Output Gauge* and Ampoule Gauge*. (Smith and Wesson Electronics Company)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

*Formerly manufactured by Stephenson Corporation.

Approved Instrument and Model Number:

Breathalyzer Model 900A

Manufacturer:

Smith and Wesson Electronics Company
2100 Roosevelt Avenue
Springfield, Massachusetts 01101

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of 34°C +/— 0.2°C. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of 34°C +/— 0.2°C. (Smith and Wesson Electronics Company)

Breathalyzer Solution Ampoules, Mouthpieces, and Bubblers; Breathalyzer Model 900A Test Records; Output Gauge* and Ampoule Gauge*. (Smith and Wesson Electronics Company)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

Gas Chromatograph Intoximeter Mark II

Manufacturer:

CalDetect, Inc.
101 West Nevin Avenue
Richmond, CA 94801

*Formerly manufactured by Stephenson Corporation.

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator*, set to maintain a solution temperature of 34°C +/— 0.2°C. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of 34°C +/— 0.2°C. (Smith and Wesson Electronics Company)

Digital Concentration Readout Accessory. (CalDetect, Inc.)

External Chart Recorder, MPI Model MP-1027. (Cal-Detect, Inc.)

Mouthpieces; Intoximeter Waste Bag Assembly with Check Valve and Restrictor; Plug-In Calibrator. (Cal-Detect, Inc.)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath sample collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Also, analysis of breath samples which are collected with an Intoximeter Field Crimper-Indium Tube Encapsulation Kit, a breath alcohol capturing device designed for entrapment of the alcohol in a breath sample for later analysis using a Gas Chromatograph Intoximeter Mark II.

Approved Instrument and Model Number:

*Intoxilyzer Model 4011**

Manufacturer:

CMI, Incorporated
P.O. Drawer D, Old Hwy 6
Minturn, Colorado 81645

*Formerly manufactured by Stephenson Corporation.

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator**, set to maintain a solution temperature of 34°C +/— 0.2°C, and modified to have outlet tube tightly secured to the Simulator outlet. (Smith and Wesson Electronics Company)

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of 34°C +/— 0.2°C. (Smith and Wesson Electronics Company)

Luckey Simulator, set to maintain a solution temperature of 34°C +/— 0.2°C. (Luckey Laboratories, Inc.)

Mouthpieces; Evidence Card. (CMI, Incorporated)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

*Intoximeter Field Crimper-Indium Tube
Encapsulation Kit*

(No Model Number Designated)

Manufacturer:

CalDetect, Inc.
101 West Nevin Avenue
Richmond, CA 94801

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator**, set to maintain a solution temperature of 34° +/— 0.2°C. (Smith and Wesson Electronics Company)

*Formerly manufactured by Omicron Systems Corporation.

**Formerly manufactured by Stephenson Corporation.

Mark IIA Breath Alcohol Simulator, set to maintain a solution temperature of 34°C +/— 0.2°C. (Smith and Wesson Electronics Company)

Gas Chromatograph Intoximeter Mark II with or without Digital Concentration Readout Accessory. (CalDetect, Inc.)

Intoximeter Waste Bag Assembly with Check Valve and Restrictor. (CalDetect, Inc.)

Authorized Breath Alcohol Analysis with this Instrument:

Analysis of breath samples collected with this breath alcohol capturing device designed for entrapment of the alcohol in a breath sample for later analysis.

Restriction: No more than 14 days shall elapse between the time a sample is captured by the Intoximeter Field Crimper-Indium Tube Encapsulation Kit and the time that sample is analyzed in Gas Chromatograph Intoximeter Mark II.

**State of California
Department of Health**

**LIST OF INSTRUMENTS AND RELATED
ACCESSORIES APPROVED FOR BREATH
ALCOHOL ANALYSIS**

Date of Preparation of this List: August 8, 1973.

Section 1221.3 of the Regulations Relating to Forensic Alcohol Analysis, contained in Title 17 of the California Administrative Code, states that only such instruments as have been approved by the California State Department of Health shall be used for breath alcohol analysis in this State; approval shall be based on laboratory evaluation by the Department of such instruments' ability to

meet the standards of performance set forth in Section 1221.2 of the Regulations.

The following is the list of instruments and related accessories which are so approved. This list supersedes and replaces the list published on December 31, 1971. Instruments are named in alphabetical order.

Approved Instrument and Model Number:

Alco-Analyzer Gas Chromatograph

(No Model Number Designated)

Manufacturer:

Luckey Laboratories, Inc.

7252 Osbun Road

San Bernardino, California 92404

Related Accessories Approved for this Instrument:

Luckey Simulator, set to maintain a solution temperature of 34°C +/— 0.2°C. (Luckey Laboratories, Inc.)*

Luckey 5-inch Gas Chromatograph Chart Recorder and Sola Transformer. (Luckey Laboratories, Inc.)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

Breathalyzer Model 900

Manufacturer:

Smith and Wesson Electronics Company

Meridian Road

Eatontown, New Jersey 07724

*Source or sources of accessories shown in parentheses.

Related Accessories Approved for this Instrument:

Equilibrator. (Smith and Wesson Electronics Company; Stephenson Corporation)

Mark II Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company; Stephenson Corporation)

Breathalyzer Solution Ampoules, Mouthpieces, and Bubbler; Breathalyzer Model 900 Test Records; Output Gauge and Ampoule Gauge. (Smith and Wesson Electronics Company; Stephenson Corporation)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

Breathalyzer Model 400

Manufacturer:

This instrument is no longer being manufactured. Its manufacturer was:

Stephenson Corporation
Box 1000
Red Bank, New Jersey 07701

Related Accessories Approved for this Instrument:

Equilibrator. (Smith and Wesson Electronics Company; Stephenson Corporation)

Mark II Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company; Stephenson Corporation)

Breathalyzer Solution Ampoules, Mouthpieces, and Bubbler; Breathalyzer Model 400 Test Records; Out-

put Gauge and Ampoule Gauge. (Smith and Wesson Electronics Company; Stephenson Corporation)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

Gas Chromatograph Intoximeter Mark II

Manufacturer:

Intoximeters, Inc.
1901 Locust Street
St. Louis, Missouri 63103

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator, set to maintain a solution temperature of $34^{\circ}\text{C} +/ - 0.2^{\circ}\text{C}$. (Smith and Wesson Electronics Company; Stephenson Corporation)

Digital Concentration Readout Accessory. (Intoximeters, Inc.)

External Chart Recorder, MPI Model MP-1027. (Intoximeters, Inc.)

Mouthpieces; Intoximeter Waste Bag Assembly with Check Valve and Restrictor; Plug-in Calibrator. (Intoximeters, Inc.)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath sample collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Also, analysis of breath samples which are collected with an Intoximeter Field Crimper-Indium Tube Encapsulation Kit, a breath alcohol capturing device de-

signed for entrapment of the alcohol in a breath sample for later analysis using a Gas Chromatograph Intoximeter Mark II.

Approved Instrument and Model Number:

Intoxilyzer Model 4011

Manufacturer:

Omicron Systems Corporation
1052 East Meadow Circle
Palo Alto, California 94303

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator, set to maintain a solution temperature of 34°C +/— 0.2°C. (Omicron Systems Corporation)

Luckey Simulator, set to maintain a solution temperature of 34°C +/— 0.2°C. (Luckey Laboratories, Inc.)

Mouthpieces; Evidence Card. (Omicron Systems Corporation)

Authorized Breath Alcohol Analysis with this Instrument:

Immediate analysis of breath samples collected by direct expiration by the subject into the instrument in which the measurement of alcohol concentration is performed.

Approved Instrument and Model Number:

Intoximeter Field Crimper-Indium Tube Encapsulation Kit

(No Model Number Designated)

Manufacturer:

Intoximeters, Inc.
1901 Locust Street
St. Louis, Missouri 63103

Related Accessories Approved for this Instrument:

Mark II Breath Alcohol Simulator, set to maintain a solution temperature of 34°C +/— 0.2°C. (Smith and Wesson Electronics Company; Stephenson Corporation)

Gas Chromatograph Intoximeter Mark II with or without Digital Concentration Readout Accessory. (Intoximeters, Inc.)

Intoximeter Waste Bag Assembly with Check Valve and Restrictor. (Intoximeters, Inc.)

Authorized Breath Alcohol Analysis with this Instrument:

Analysis of breath samples collected with this breath alcohol capturing device designed for entrapment of the alcohol in a breath sample for later analysis.

Restriction: No more than 14 days shall elapse between the time a sample is captured by the Intoximeter Field Crimper-Indium Tube Encapsulation Kit and the time that sample is analyzed in Gas Chromatograph Intoximeter Mark II.

EXHIBIT F

COLORADO DEPARTMENT OF HEALTH
4210 East 11th Avenue, Denver, Colorado 80220
Phone 388-6111

Edward G. Dreyfus, M.D., M.P.H. Executive Director

NOTICE OF FINAL ADOPTION RULES
AND REGULATIONS RELATING TO CHEMICAL
TESTS FOR BLOOD ALCOHOL
IMPLIED CONSENT LAW

Pursuant to the provisions of section 3-16-2(11) (k),
Colorado Revised Statutes, 1963, as amended, NOTICE

is hereby given that on October 17, 1973 the Colorado State Board of Health adopted certain rules subsequent to public hearings held pursuant to and in accordance with due and proper legal notice.

The rules adopted by the board are captioned as follows:

RULES AND REGULATIONS RELATING TO
CHEMICAL TESTS FOR BLOOD ALCOHOL,
IMPLIED CONSENT LAW.

A copy of said rules, as adopted by the board, is attached and made a part of this notice.

The legal authority for the board to adopt the rules is contained in section 13-5-30, Colorado Revised Statutes, 1963, as amended.

The effective date of said rules will be twenty (20) days after the date upon which this notice is published.

Dated this 19th day of June, 1974, at Denver, Colorado.

/s/ E. G. Dreyfus
EDWARD G. DREYFUS, M.D., M.P.H.
Secretary,
Colorado State Board of Health

EGD:MPI:sk
Encl.
(Legal List)

Effective Date: July 9, 1974

RULES AND REGULATIONS
OF THE COLORADO STATE BOARD OF HEALTH
RELATING TO CHEMICAL TESTS FOR BLOOD
ALCOHOL IMPLIED CONSENT LAW

The following rules and regulations shall govern the obtaining of blood, urine, and breath specimens and making

chemical tests and analysis thereof to determine blood alcohol, carbon monoxide, and drug content by proper methods and procedures pursuant to Section 13-5-30, Colorado Revised Statutes 1963, as amended, and rescind subject regulations effective October 1, 1971.

I. *Sample Collection*

A. Living Persons

1. *Blood*

- (a) The blood sample shall be collected by venipuncture only by persons authorized by law, and by means of a sterile syringe and hypodermic needle or other equipment of equivalent sterility. The skin at the area of puncture shall be thoroughly cleansed and disinfected, but shall not be sterilized with alcohol, alcoholic solutions or phenol. The sample thus obtained shall be dispensed or collected directly into two sterile tubes containing sufficient sodium fluoride as an anticoagulant and antibacterial agent so that the final concentration shall contain not less than 1% sodium fluoride. The blood sample shall be properly mixed with the anticoagulant, sealed, and labeled. The sample thus taken and sealed shall, at all times thereafter, be handled in such a manner that the "chain of evidence" may be preserved.

- (b) The blood sample shall be delivered to a laboratory certified by the Department of Health to conduct tests for alcohol content. At the laboratory the seal shall be broken on the container and one tube of blood shall be opened and analyzed while the second tube of blood shall be retained in storage at 4°C or less for a period of not less than one year for further studies if needed.
- (c) The test must be completed within ten (10) days of collection of the specimen.

2. *Urine*

- (a) Urine specimens shall be collected in the presence of the arresting officer or other responsible person who can authenticate the sample. The sample shall be collected as follows:

The patient shall empty his bladder and the urine be discarded. A urine sample shall be obtained 20 minutes following emptying the bladder. Twenty minutes later a second urine sample shall be obtained. These two urine samples shall be placed in urine containers with sufficient sodium fluoride as a preservative so that the final concentration shall be not less than 1% sodium fluoride. The urine sample shall be properly mixed with the preservative, sealed, and labeled. The sample thus taken and sealed shall, at all times thereafter, be handled in such a manner that the "chain of evidence" may be preserved.

- (b) Urine samples shall be delivered to a laboratory certified by the Department of Health to conduct tests for alcohol.
- (c) The tests must be completed within ten (10) days of collection of the specimen. Upon completion of the analysis, the specimen shall be retained in storage at a temperature of 4°C or less for a period of not less than one year for further studies.

3. *Breath*

Breath samples shall be appropriately collected for testing in mechanical devices in facilities certified by the Colorado Department of Health.

B. Dead Persons

A blood and urine specimen, if available, from any person who is dead as the result of a motor vehicle accident, shall be obtained and tested as required by the State Board of Health Rules and Regulations pertaining to C.R.S. 13-5-161.

II. *Prescribed Test Method*

A. Alcohol

Body fluids for ethyl alcohol content by weight shall be tested using gas chromatographic procedures or other methods of equivalent precision and accuracy. Laboratories using methods which produce satisfactory grades in the Department of

Health Alcohol Test Evaluation Program shall be considered to have used methods having acceptable precision and accuracy.

Breath specimens shall be analyzed in mechanical devices in accordance with the manufacturer's instructions and operations manual, and in accordance with the special instructions as may be issued by the Colorado Department of Health. Each and every breath testing instrument shall be inspected and performance evaluated annually by the Colorado Department of Health.

III. Certified Laboratories

- A. The Colorado Department of Health Laboratory is certified to conduct such tests.
- B. Other laboratories may be certified to conduct such tests subject to the following standards and procedures.
 1. Laboratories under the direct supervision and direction of a clinical pathologist upon presentation of evidence of satisfactory participation in a national quality control program in toxicology or satisfactory participation in the Alcohol Test Evaluation Program provided by the Department of Health shall be certified.
 2. Laboratories which are licensed for toxicology under the Federal Clinical Laboratories Improvement Act of 1967, and which give evidence of satisfactory participation in a national quality control program in toxicol-

ogy or the Alcohol Test Evaluation Program provided by the Department of Health shall be certified.

3. Other laboratories shall furnish the Department of Health evidence concerning the scientific training and experience in clinical chemistry of its director and shall present evidence of satisfactory participation in a national quality control program in toxicology or in the Alcohol Test Evaluation Program provided by the Department of Health. Prior to approval at least ten (10) specimens distributed by the Department of Health shall be analyzed for the presence of alcohol. The results on at least 90% of the quantitatively analyzed samples shall be within 10% of the actual amount of alcohol contained in the specimen.

C. Law Enforcement Agencies

Law enforcement agencies may be certified to conduct tests for blood alcohol content by breath testing procedures pursuant to the following regulations.

1. Officers conducting the tests shall have had training in the operation of the breath testing machines.
2. Prior to certification and annually thereafter, a proficiency test of the machine shall be conducted by the State Health Department with the results of at least 90% of the specimens analyzed falling within 10% of the alcoholic content of the specimen.

D. General Requirements

1. Application for certification to conduct chemical tests for alcohol under these regulations shall be made by letter application to the Department of Health. Application for annual recertification shall be submitted by December 1st (first) of each year.
2. The laboratory director shall be directly responsible for the accuracy of the laboratory tests performed as well as the accuracy of the reports issued.
3. Each certified laboratory shall have adequate space, equipment, reagents and controls available for the performance of the tests. It shall give evidence of the utilization of a written method of analysis to carry out the tests required under these regulations.
4. Each laboratory shall be subject to inspection by authorized personnel of the Department of Health prior to certification and may be reinspected at any time.
5. Certified laboratories may from time to time be subjected to performance tests conducted in a manner prescribed by the Executive Director of the Department of Health. Each laboratory shall have access to the records of its own performance test results.
6. The State Board of Health may refuse to renew its certification or may suspend or revoke its certification of any laboratory after

notice and hearing held pursuant to the provision of Article 16, Ch. 3, CRS 1963, as amended, for any one or more of the following causes:

- (a) Fraud or deceit in applying for or obtaining the certification or any renewal thereof;
 - (b) Conviction of any crime involving moral turpitude;
 - (c) Gross incompetence or negligent malpractice;
 - (d) Willful or repeated violation of any lawful rule, regulation, or order of the State Board of Health or its officers;
 - (e) Inadequate facilities or equipment;
 - (f) Inadequate scores on any performance tests conducted in a manner prescribed by the Executive Director of the Department of Health.
7. Records shall be kept and maintained by the laboratory which reflect the pertinent facts relating to tests performed and they shall be open to inspection by authorized personnel of the Department of Health.

COLORADO DEPARTMENT OF HEALTH

Richard D. Lamm
Governor

Frank A. Traylor, M.D.
Executive Director

CERTIFICATE

I, FRANK A. TRAYLOR, of the Colorado Department of Health hereby certify that the attached "Rules and Regulations Relating to Chemical Tests for Blood Alcohol-Implied Consent Law" is a true and correct reproduced copy of the rules and regulations adopted by the State Board of Health February 20, 1980, effective March 31, 1980, and have remained in full force and effect without change through the date of execution hereof.

That said rules have been approved by the Colorado Attorney General as to legality and constitutionality and were duly filed in the Office of the Secretary of State as made and were published in the Code of Colorado Regulations as provided by law.

Date April 27, 1981.

/s/ Frank A. Traylor, Jr.
Frank A. Traylor, Jr., M.D.
Executive Director

4210 East 11th Avenue, Denver, Colorado 80220
Phone (303) 320-8333

**RULES AND REGULATIONS
OF THE COLORADO BOARD OF HEALTH
RELATING TO CHEMICAL TESTS FOR BLOOD
ALCOHOL IMPLIED CONSENT LAW, 5-CCR-1005-2**

The following rules and regulations shall govern the obtaining of blood, urine, and breath specimens and making chemical tests and analysis thereof to determine blood alcohol by proper methods and procedures pursuant to Colorado Revised Statutes 1973, 42-4-1202, as amended, and rescind subject regulations effective July 9, 1974.

I. Sample Collection**A. Living Persons****1. Blood**

- a. Blood samples shall be collected in the presence of the arresting officer or other responsible person who can authenticate the samples. Blood samples shall be collected by venipuncture by a physician, a registered nurse, or a person whose normal duties include withdrawing blood samples under the supervision of a physician or registered nurse. Blood samples shall be collected using a sterile syringe and hypodermic needle or other equipment of equivalent sterility. The skin at the area of puncture shall be thoroughly cleansed and disinfected with an aqueous solution of nonvolatile antiseptic. Alcohol or phenolic solutions shall not be used as a skin antiseptic. The samples thus obtained shall be dispensed or collected directly into two sterile tubes containing sufficient sodium fluoride as an anticoagulant and antibacterial agent so that the final concentration shall contain not less than 1% sodium fluoride. The blood samples shall be properly mixed with the sodium fluoride, sealed and labeled. The identity and integrity of the samples shall be maintained through collection to analysis and reporting.

- b. The blood samples shall be delivered to a laboratory certified by the Colorado Department of Health, Division of Laboratories, to conduct test(s) for alcohol content. At the laboratory the seal shall be broken on one tube and the blood shall be analyzed. The test(s) must be completed within ten (10) days of collection of the specimen. The second tube of blood shall be retained by the laboratory at 4°C or less for a period of not less than one year. The saved samples shall be made available to the defendant upon request.

2. Urine

- a. Urine samples shall be collected in the presence of the arresting officer or other responsible person who can authenticate the samples. The samples shall be collected as follows:

The subject shall empty his bladder and the urine be discarded. Twenty (20) minutes after first voiding the bladder a urine sample shall be collected in a clean container and dispensed into two (2) tubes containing antibacterial agent(s). Twenty (20) minutes after the second voiding a second urine sample shall be collected in a clean container. These two urine samples shall each be placed into two urine containers with sufficient sodium fluoride as a preservative so that the final concentration shall not

be less than 1% sodium fluoride. The four urine samples shall be mixed with the preservative, sealed, and labeled. The identity and integrity of the samples shall be maintained through collection to analysis and reporting.

- b. The urine samples shall be delivered to a laboratory certified by the Colorado Department of Health, Division of Laboratories, to conduct tests for alcohol content. At the laboratory the seals shall be broken on one urine sample from each of the voidings and analyzed. The test must be completed within ten (10) days of collection of the specimens. The second set of two urine samples shall be retained at 4°C or less for a period of not less than one year. The saved samples shall be made available to the defendant upon request.

3. Breath

- a. Breath samples shall be collected by certified operators only and shall be expired breath which is essentially alveolar in composition. Breach samples shall be collected only after the subject has been under continuous observation for at least twenty (20) minutes prior to collection of the breath sample. During this time the subject must not belch, regurgitate, or take any foreign substance by nose or mouth. If such occurs another twenty

(20) minutes must elapse prior to collection.

- b. One breath sample shall be used for the direct breath test for blood alcohol concentration or for a delayed test to be analyzed within ten (10) days of collection.
- c. A sample of the subject's breath or the alcoholic content therefrom shall be collected pursuant to the procedures in the Appendices. The samples shall be saved for a period of not less than one year. The saved sample shall be made available to the defendant upon request.

B. Dead Persons

A blood and urine specimen, if available, from any person who is dead as the result of a motor vehicle or aircraft accident, shall be obtained and tested as required by the State Board of Health Rules and Regulations pertaining to C.R.S. 1973, 42-4-1211, as amended.

II. Methods of Alcohol Analysis

A. Alcohol in Body Fluids

1. The method used shall be capable of analyzing reference samples of known alcohol concentration within accuracy and precision limits of plus or minus 10% of the actual blood alcohol concentration.

2. All analytical results shall be expressed in terms of the alcohol concentration in blood, based on the number of grams of alcohol per 100 cubic centimeters or per 100 milliliters of blood.
3. A urine alcohol concentration shall be converted to an equivalent blood alcohol concentration by a calculation based on alcohol in urine to alcohol in blood ratio of 1.3:1.

B. Alcohol In Breath Samples—Minimum Requirements for Direct Breath Test

1. Breath samples shall be collected by certified operators only in instruments and equipment approved by the Colorado Department of Health, Division of Laboratories.
2. On or after July 1, 1980, all organizations selling or offering for sale instruments for blood alcohol analysis by breath means in this State shall register such instruments with the Colorado Department of Health. On or after January 1, 1981, only such instruments as have been approved by the Colorado Department of Health shall be used for blood alcohol testing by breath means in this State. Approval or disapproval shall be based on laboratory evaluation by the Colorado Department of Health of such instruments' ability to meet the standards of performance set forth in these regulations.
3. A system blank analysis shall be used in connection with each direct breath test.

4. A suitable reference sample, such as air equilibrated with a reference solution of known alcohol content at a known temperature must be used with each direct breath test. The result of such analysis must agree with the reference sample value within the limits of $\pm 10\%$ w/v.
5. The instruments shall be maintained and calibration checked periodically by the Operator Instructor. Periodic calibration checks shall be at least monthly and be exclusive of the tests analyzed by the instrument.
6. The method used shall be capable of analyzing reference samples of known alcohol concentration within accuracy and precision limits of plus or minus 10% of the actual alcohol concentration.
7. Standardized records shall be kept for each instrument to show maintenance performed, calibration tests, analyses performed, results and identities of the persons performing analyses.
8. Colorado Department of Health, Division of Laboratories shall review and prescribe the Operational Checklist and Procedures to be used with breath testing devices for blood alcohol testing. The Operational Checklists and Procedures are found in the Appendices.
9. A blood alcohol concentration by analysis of a breath specimen shall be converted to an

equivalent blood alcohol concentration ratio of 1 to 2100. All analytical results shall be expressed in terms of the alcohol concentration in blood, based on the number of grams of alcohol per 100 cubic centimeters or per 100 milliliters. % and % w/v shall be regarded as acceptable abbreviations of the phrase, grams per 100 cubic centimeters or grams per 100 milliliters.

III. Certified Facilities

- A. The Colorado Department of Health, Division of Laboratories, is certified to conduct blood alcohol tests.
- B. Other facilities may be certified to conduct blood alcohol tests subject to the following standards and procedures.
 1. Laboratories seeking certified status shall furnish the Department of Health, Division of Laboratories, in writing evidence concerning the scientific training and experience in clinical chemistry of its director and personnel performing blood alcohol tests. Colorado Department of Health, Division of Laboratories, shall provide to the requesting facility ten (10) specimens which shall be analyzed for alcohol content. For certification the results of at least 90% of the quantitatively analyzed samples shall be within 10% of the actual amount of alcohol contained in the specimen. Certificates shall be issued to laboratories successfully completing the proficiency testing.

2. A proficiency testing of all laboratories shall be conducted annually by the Colorado Department of Health, Division of Laboratories. Performance is considered satisfactory if the results of at least 90% of the specimens analyzed fall within 10% of the alcoholic content of the specimen. Continued certification of the laboratory will depend on satisfactory performance in the annual proficiency testing.

C. Law Enforcement Agencies

1. Law enforcement agencies may be certified to conduct blood alcohol tests by breath testing procedures.
2. Prior to certification of the instrument and annually thereafter, a proficiency test of the instrument shall be conducted by the Colorado Department of Health, Division of Laboratories, with the results of at least 90% of the specimens analyzed falling within 10% of the alcoholic content of the specimen.
3. Personnel conducting the tests shall be certified in the operation of the breath testing instrument(s).

IV. Certified Operators of Breath Test Equipment

A. Certification of Operators of Breath Testing Instruments to Determine Blood Alcohol Concentration

1. Operators who have certificates of training in breath testing to determine blood alcohol

concentration issued from the Colorado Department of Health, Division of Laboratories, prior to the adoption of these rules and regulations are considered certified operators subject to Section IV(A) (3).

2. Certified operators shall have a minimum of eight (8) hours of instruction to include the following:
 - a. Value and purpose of blood alcohol testing by breath means.
 - b. Physiological action of alcohol on the human body.
 - c. Pharmacology and Toxicology of alcohol.
 - d. Methods of alcohol analysis and Theory of Breath Testing.
 - e. Instruments and procedures for breath testing.
 - f. Laboratory Practice and Demonstration of Competency.
 - g. Court Testimony.
 - h. A comprehensive Practical and Written Examination to be administered by the Colorado Department of Health, Division of Laboratories.
3. To maintain proficiency on direct breath test instruments, the certified operator shall test a minimum of four (4) simulator solutions every six (6) months. The Operator Instructors will prepare the simulator solutions at

varying concentrations and shall also supervise the testing of same.

B. Certification of Operator Instructors

1. Certified Operator Instructors shall have a minimum of sixteen (16) hours of instruction to include the following:
 - a. Value and purpose of blood alcohol analysis and blood alcohol analysis by breath sampling.
 - b. Physiological action of alcohol on the human body.
 - c. Pharmacology and Toxicology of alcohol.
 - d. Instruments and Procedures for blood alcohol analysis.
 - e. Interpretation of results of alcohol analysis.
 - f. Court Testimony.
 - g. Laboratory methods of alcohol analysis.
 - h. Preparation of standard simulator solutions.
 - i. Operational principles of the selected breath testing instruments.
 - j. Instructor Training.
 - k. Laboratory Practice and Demonstration of Competency.
 - l. A comprehensive Practical and Written Examination to be administered by the Colorado Department of Health.

2. Duties of Certified Operator Instructors

Certified Operator Instructors shall be qualified to train and certify Operators of breath testing instruments. They shall give operator training and instruction classes following the course of instruction as outlined by the Colorado Department of Health, Division of Laboratories. Operator certification certificates will be issued by the Laboratory Division to individuals who successfully pass the course of instruction including tests designed, specified, and graded by personnel of the Colorado Department of Health, Division of Laboratories.

- 3. At least annually certified Operator Instructors shall give a certification and training class. Prior to the certification and training class, the Colorado Department of Health, Division of Laboratories, will test the Operator Instructor's proficiency on the breath testing device to be used.**

V. General Requirements

- A. Initial application for certification to conduct chemical tests for alcohol under these regulations shall be made by letter to the Colorado Department of Health, Division of Laboratories.**
- B. The Facility Director shall be directly responsible for the accuracy of the tests performed as well as the accuracy of the reports issued.**
- C. Each certified facility shall have adequate space, equipment, materials, and controls available for**

the performance of the tests. Each certified facility shall give evidence of the utilization of a written method of analysis to carry out the tests required under these regulations.

- D. Each facility shall be subject to inspection by authorized personnel of the Department of Health prior to certification and may be re-inspected at any time.
- E. Certified facilities may from time to time be subjected to performance tests conducted in a manner prescribed by the Colorado Department of Health, Director of Laboratories. Each facility shall have access to the records of its own performance test results.
- F. The State Board of Health may refuse to renew its certification or may suspend or revoke its certification of any facility after notice and hearing held pursuant to the provision of C.R.S. 1973, 24-4-104, as amended, for any one or more of the following causes:
 - 1. Fraud or deceit is applying for or obtaining the certification or any renewal thereof;
 - 2. Gross incompetence or negligent malpractice;
 - 3. Willful or repeated violation of any lawful rule, regulation, or order of the State Board of Health or its officers;
 - 4. Inadequate facilities or equipment;
 - 5. Inadequate scores on any performance tests conducted in a manner prescribed by the Colo-

rado Department of Health, Division of Laboratories.

- G. Records shall be kept and maintained by the facility which reflect the pertinent facts relating to tests performed and they shall be open to inspection by authorized personnel of the Colorado Department of Health, Division of Laboratories.
- H. The Colorado Department of Health, Division of Laboratories, shall publish annually a list of certified facilities which will be supplied to any interested party upon written request.

APPENDIX A

I. Operational Checklists and Procedures—Direct Breath Test(s)

A. Breathalyzer Model 900 and 900A Operational Check List

1. Observe subject for twenty (20) minutes prior to testing to prevent oral intake of any material.
2. Throw switch to the "ON" position. Wait until the thermometer shows 50°C +/— 3°C.
3. Gauge reference ampoule and insert into left hand holder. Record ampoule control number.
4. Gauge test ampoule, open, insert bubbler and connect to outlet. Insert test record card. Record ampoule control number.
5. Turn to take and flush out. Turn to analyze.

6. When red empty signal lamp appears, wait ninety (90) seconds or until Read light comes on.
7. Turn light on and balance. Set blood alcohol pointer on start line.
8. Turn to take and attach standard simulator test to the breath tube. Analyze the simulator specimen. Simulator temperature is 34°C.
9. Repeat step number six (6).
10. Turn light on and balance. Record results.
11. Insert new test record card.
12. Repeat steps five (5) thru seven (7).
13. Turn to take. Attach a clean mouth piece to the breath tube. Have the subject blow with long sustained breaths. Turn to analyze.
14. Repeat step number six (6).
15. Turn light on and balance. Record results of subject's B.A.C.
16. Remove the test record card and record all information as needed.
17. Turn instrument "OFF". Turn control knob to off. Dispose of the test ampoule. Remove the reference ampoule.

B. Breathalyzer Model 1000 Operational Check List

1. Observe subject for twenty (20) minutes prior to testing to prevent oral intake on any material.

2. Advance switch to the reset position and allow the wait light to go out.
3. Gauge the reference ampoule and insert into the left hand ampoule holder. Record the ampoule control number.
4. Gauge the test ampoule, open, insert bubbler and connect to outlet. Record the ampoule control number. Close cover.
5. Insert ticket and advance switch to the run position.
6. When sample-blow light comes on, attach the standard simulator test to the breath tube. Analyze the simulator specimen. Simulator temperature is 34°C.
7. After cycle is complete return switch to the reset position.
8. Advance switch to the run position.
9. When sample-blow light comes on, attach a clean mouth piece to the breath tube. Have the subject blow with long sustained breaths until the instrument takes the sample for analysis.
10. After cycle is complete return the switch to the off position.
11. Remove the ticket and record all information as needed.
12. Dispose of the test ampoule. Remove the reference ampoule.

C. CMI Intoxilyzer Model 4011A and 4011AS Operational Check List

1. Observe the subject twenty (20) minutes prior to testing to prevent oral intake of any material.
2. Turn power switch on. Observe ready light on.
3. Insert the test record card.
4. Connect the breath tube to the pump tube.
5. Turn the mode selector switch to zero set. Depress and turn zero adjust knob so that the digital readout displays a +.000 to +.003.
6. Turn the mode selector switch to air blank.
7. After cycle is completed, turn the mode selector switch to zero set. Readjust zero set knob to obtain proper zero, +.000 to +.003.
8. Connect simulator to breath tube and pump tube. Turn mode selector switch to calibrator. Simulator temperature 34°C.
9. After calibrator cycle is completed, connect the breath tube to the pump tube. Turn mode selector to air blank.
10. After air blank cycle is completed, turn mode selector to zero set. Readjust zero set knob to obtain proper zero, +.000 to +.003.
11. Turn mode selector switch to the breath mode. Disconnect the breath tube from the pump tube. Place a clean mouthpiece on the

breath tube. Have the subject blow with long sustained breaths until breath cycle is completed.

12. Connect the breath tube to the pump tube. Remove the caps from a new silica gel tube and attach to the breath outlet. Turn the mode selector switch to the air blank position.
13. After the air blank cycle is completed, turn the mode selector switch to zero set. Remove the silica gel tube from the breath outlet and recap.
14. Turn the instrument off; remove the ticket and record all information as needed.

D. Luckey Alco-Analyzer Gas Chromatograph Operational Check List

1. Observe the subject for twenty (20) minutes prior to testing to prevent oral intake of any material.
2. Set the helium flow at the prescribed PSI. Check column temperature for proper setting.
3. Turn on the recorder and chart drive. Turn on the detector.
4. Set the recorder ink pen onto the paper and adjust to the prescribed baseline.
5. Place the analyze lever in the take position. Analyze the simulator specimen. Simulator temperature is 34°C. Place the analyze lever in the analyze position.

6. When pen return to baseline, place the analyze lever in the take position. Inject a blank air sample.
 7. When pen returns to baseline, place the analyze lever in the take position. Attach a clean mouthpiece to the breath tube. Have subject blow with long sustained breaths. While whistle is sounding, place the analyze lever in the analyze position.
 8. When pen returns to baseline repeat step number five (5).
 9. When pen returns to baseline, roll chart forward and tear off recording of results and record all information as needed.
 10. Turn helium to standby PSI. Turn off recorder, chart drive, and detector. Lift ink pen from paper.
- E. Intoximeter MK II Gas Chromatograph Operational Check List

1. Observe subject for twenty (20) minutes prior to testing to prevent oral intake of any material.
2. Observe the red light on and the orange light on.
3. Turn the selector switch from stand-by to operate.
4. Push the ignite button until the green light comes on.

5. With the selector switch in the blank position push the analyze button. When green light comes back on permanently instrument is clear. Note the +.000 reading.
6. With the selector switch in the sample position analyze the standard simulator test. Simulator temperature is 34°C.
7. Repeat step number five (5).
8. Attach a clean mouth piece to the breath tube. Empty the air waste bag. Put the selector switch in the sample position.
9. Have the subject blow with long sustained breaths until the whistle sounds. While the whistle is sounding, push the analyze button.
10. When the recorder stops, move the chart forward and tear off the recording of results.
11. Record all information as needed.
12. Turn instrument to stand-by.

F. Intoximeter MK IV Gas Chromatograph Operational Check List

1. Observe subject for twenty (20) minutes prior to testing to prevent oral intake of any material.
2. Push green button to operate position. Steady green light comes on.
3. Digital readout is at +.000. If not push the red reset button and release.

4. Push and release the yellow analyze button. When recorder stops, the instrument is clear. Note the +.000 reading.
5. Analyze the known standard simulator test. Simulator temperature is 34°C.
6. Repeat step number four (4).
7. Attach a clean mouthpiece to the breath tube. Have the subject blow with long sustained breaths until the instrument takes the sample for analysis.
8. When the recorder stops, move the chart forward and tear off the recording of results.
9. Record all information as needed.
10. Turn instrument to stand-by.

APPENDIX B

II. Operational Checklists and procedures — Delayed Breath Test(s)

A. Indium Crimper Operational Checklist

1. Observe subject for twenty (20) minutes prior to testing to prevent oral intake of any material.
2. Open template bag, attach filter and check valve.
3. Attach handle and power cord. Mount template in crimper, and lock in place. Close lid and lock.

4. Plug in crimper and observe red light on. Allow fifteen (15) minutes or more warm up time. Red light will go off when ready.
5. Assemble mouthpiece to the waste bar and attached to filter.
6. Have subject blow with one long sustained breath until whistle sounds. With whistle sounding, squeeze crimper handle for several seconds.
7. Open crimper and note that at least one of the color bands on the jaw mounted temperature strip has appeared.
8. Remove the template and note the numbers on the indium webbing. Record the jaw numbers indicating a proper seal.
9. Place all parts in the box. Label and seal.
10. Complete the identification data as needed.

B. SM-7 Sobermeter "MOBAT"

1. Observe subject for twenty (20) minutes prior to testing to prevent oral intake of any material.
2. Remove and save the plastic caps from both ends of the silica gel collection tubes.
3. Pretest the volumetric bag (2100 cc) for leaks. If a leak is found, replace with a new volumetric bag.
4. Attach one end of a collection tube to the volumetric bag. Attach the other end of the collection tube to the end of the rubber bal-

loon which does not have the long plastic sleeve.

5. Direct the subject to inflate the balloon with long uninterrupted breath. Between each breath collapse the long plastic waste sleeve. The balloon will inflate, air will pass through the collection tube and collect in the volumetric bag. Allow air to flow until the volumetric bag is tight.
 6. When the volumetric bag is filled twist the balloon shut at the end nearest the collection tube and remove the collection tube and volumetric bag. Expel all air from the volumetric bag and place the other collection tube on the balloon and attach the volumetric bag. Allow air to flow until the volumetric bag is filled. The subject may have to inflate the balloon if more air is needed to fill the second volumetric bag.
 7. Remove the collection tube from the balloon **FIRST** and then from the volumetric bag. Replace the plastic caps on both collection tubes, expel the air from the volumetric bag, waste bag, and balloon.
 8. Complete the identification data as needed.
 9. Place all parts in the box. Label and seal.
- C. SM-8 Sobermeter "Mini-MOBAT"
1. Observe the subject for twenty (20) minutes prior to testing to prevent oral intake of any material.

2. Remove and save the plastic caps from the ends of the silica gel collection tube.
3. Pretest the volumetric bag (525 cc) for leaks. If a leak is found, replace it with a new volumetric bag.
4. Attach one end of the collection tube to the volumetric bag. Attach the other end of the collection tube to the long plastic waste sleeve.
5. Direct the subject to inflate the volumetric bag with a long uninterrupted breath. Between each breath collapse the long plastic waste sleeve. Allow air to flow until the volumetric bag is tight.
6. Remove the collection tube from the plastic waste sleeve and then from the volumetric bag. Replace the plastic caps on both ends of the collection tube.
7. Complete the identification data as needed.
8. Place all parts in the envelope. Label and seal.

Adopted by the Colorado Board of Health
February 20, 1980

(State of Colorado Seal)

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Regulation Vehicles and Traffic

42-4-1202. Driving under the influence - driving while impaired implied consent to chemical tests - penalties. (1)
(a) It is a misdemeanor for any person who is under the influence of intoxicating liquor to drive any vehicle in this state.

(b) It is a misdemeanor for any person to drive any vehicle in this state while such person's ability to operate a vehicle is impaired by the consumption of alcohol.

(c) It is a misdemeanor for any person who is an habitual user of or under the influence of any narcotic drug or who is under the influence of any other drug to a degree which renders him incapable of safely operating a vehicle to drive a vehicle in this state. The fact that any person charged with a violation of this paragraph (c) is or has been entitled to use such drug under the laws of this state shall not constitute a defense against any charge of violating this paragraph (c).

(2) In any prosecution for a violation of subsection (1) (a) or (1) (b) of this section, the amount of alcohol in the defendant's blood at the time of the commission of the alleged offense or within a reasonable time thereafter, as shown by chemical analysis of the defendant's blood, urine, or breath, shall give rise to the following presumptions:

(a) If there was at such time 0.05 percent or less by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was not under the influence of intoxicating liquor and that his ability to operate a vehicle was not impaired by the consumption of alcohol.

(b) If there was at such time in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the defendant's blood, such fact shall give rise to the presumption that the defendant's ability to operate a vehicle was impaired by the consumption of alcohol, and such fact may also be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

(c) If there was at such time 0.10 percent or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of alcohol.

(d) The limitations of this subsection (2) shall not be construed as limiting the introduction, reception, or consideration of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of intoxicating liquor or whether or not his ability to operate a vehicle was impaired by the consumption of alcohol.

(3) (a) Any person who drives any motor vehicle upon a public highway in this state shall be deemed to have given his consent to a chemical test of his breath, blood, or urine for the purpose of determining the alcoholic content of his blood, if arrested for any misdemeanor offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under

the influence of, or impaired by alcohol. If such person requests that the said chemical test be a blood test, then the test shall be of his blood; but, if such person requests that a specimen of his blood not be drawn, then a specimen of his breath or urine shall be obtained and tested, the election to be made by the arresting officer.

(b) The test shall be administered at the direction of the arresting officer having reasonable grounds to believe the person to have been driving a motor vehicle while under the influence of, or impaired by, alcohol and in accordance with rules and regulations prescribed by the state board of health, with utmost respect for the constitutional rights, dignity of person, and health of the person being tested. No person except a physician, a registered nurse, or a person whose normal duties include withdrawing blood samples under the supervision of a physician or registered nurse shall be entitled to withdraw blood for the purpose of determining the alcoholic content therein. At the time of making such request, the officer, orally and by written notice (which written notice shall be in both English and Spanish and signed by said officer), shall inform the person arrested of his rights under the law and the probable consequences of a refusal to submit to such a test. Such notice shall also state the circumstances on which he relies as reasonable grounds for believing the arrested person was under the influence of alcohol. No civil liability shall attach to any person authorized to obtain blood as provided in this subsection (3) as a result of the act of obtaining blood from any person submitting thereto if the blood was obtained according to the rules and regulations prescribed by the state board of health; except that such provision shall not relieve any such per-

son from liability for negligence in the obtaining of any blood sample.

(c) If any person who has been so arrested refuses to submit to a chemical test when requested by the arresting officer, as provided in this subsection (3), the test shall not be given.

(d) Any person who is dead, unconscious, or otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn the consent provided by paragraph (a) of this subsection (3), and the test may be administered subject to paragraph (b) of this subsection (3). Any person who is dead, in addition to the tests prescribed, shall also have his blood checked for carbon monoxide content and for the presence of drugs, as prescribed by the department of health. Such information obtained will be made a part of the accident report.

(e) The department, upon the receipt of a sworn report of the law enforcement officer that he had reasonable grounds to believe the arrested person had been driving a motor vehicle while under the influence of, or impaired by, alcohol and that the person had refused to submit to the test upon the request of the law enforcement officer, shall, as soon as possible, serve notice upon said person, in the manner provided in section 42-2-117, to appear before the department and show cause why his license to operate a motor vehicle or, if said person is a nonresident, his privilege to operate a motor vehicle within this state should not be revoked. The hearing held in accordance with the order to show cause shall not be continued unless the arrested person, or his representative, can establish to the hearing officer that there has been a recent death

in the arrested person's immediate family, that the arrested person or a member of his immediate family has recently been hospitalized, or that his attorney or a witness is unable to appear, or that a similar good cause exists which prevents the arrested person from appearing at a hearing. When such good cause is established, such hearing shall be held at the earliest possible date. Nothing in this paragraph (e) shall be construed to prohibit the department from rescheduling such hearing if good cause exists which prevents the hearing from being held at the time scheduled. At such hearing, it shall first be determined whether the officer had reasonable grounds to believe that the said person was driving a motor vehicle while under the influence of, or impaired by, alcohol. If reasonable grounds are not established by a preponderance of the evidence, the hearing shall terminate, and no further action shall be taken. If reasonable grounds are established and said person is unable to submit evidence that his physical condition was such that, according to competent medical advice, such test would have been inadvisable or that the administration of the test would not have been in conformity with the rules and regulations of the state board of health or in conformity with the provisions of this section or if said person fails to attend the hearing without good cause shown, the department shall forthwith revoke said person's license to operate a motor vehicle or, if said person is a nonresident, his privilege to operate a motor vehicle within this state for a period of three months for the first such revocation and for a period of twelve months for the second and each subsequent revocation or denial within any five-year period; or, if the person is a resident without such license, the department shall deny to such person the issuance of a license for a period of

three months for the first such revocation or denial and for a period of twelve months for the second and each subsequent revocation or denial within any five-year period. All such periods of revocation or denial shall commence on the date of hearing. The revocation action provided for in this subsection (3) shall be in addition to any and all other suspensions, revocations, cancellations, or denials which may be provided by law, and any revocation taken under this subsection (3) shall not preclude other actions which the department is required to take in the administration of the provisions of this title. The hearings held by the department under this subsection (3) shall be at the district office of the department nearest the jurisdiction wherein the person was arrested.

(f) If the revocation is sustained after such a hearing, the person whose license has been revoked under the provisions of this section shall have the right to file a petition for judicial review in the appropriate court in accordance with section 42-2-127.

(g) Upon request of any person submitting to a chemical test pursuant to this subsection (3), or his attorney, the result of such test shall be made available to him forthwith.

(h) For the purpose of a criminal prosecution for a violation of subsection (1) of this section, the refusal of a person to submit to a chemical test shall not be admissible.

(4)(a) Every person who is convicted of a violation of subsection (1)(a) or (1)(c) of this section commits a class I traffic offense. Upon a conviction of a second or subsequent offense which occurred within five years of

the date of a previous offense, the offender shall be punished by imprisonment in the county jail for not less than ninety days nor more than one year and, in the discretion of the court, by a fine of not less than one hundred dollars nor more than one thousand dollars. The minimum period of imprisonment as provided upon a second or subsequent conviction for a violation of subsection (1)(a) or (1)(c) of this section shall be mandatory, and the court shall have no discretion to grant probation or to suspend the sentence therefor.

(b) Every person who is convicted of a violation of subsection (1) (b) of this section commits a class 2 traffic offense.

(Source and Annotations deleted in printing.)
